

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

DAY 5
TRANSCRIPT OF JURY TRIAL
BEFORE THE HONORABLE STEVEN J. McAULIFFE

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	I N D E X				
	WITNESS	Direct	Cross	Redirect	Recross
4	DAVID KELLY				
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1 | PROCEEDINGS

2 (IN OPEN COURT - JURY PRESENT)

3 THE CLERK: Court is in session and has for
4 consideration jury trial day five in the matter of
5 Maureen McPadden vs. Wal-Mart Stores East, LP et al.,
6 case number 14-cv-475-SM.

15 All right. Mr. Fradette, you may call your
16 next witness.

17 | MR. FRADETTE: Thank you, your Honor.

18 | Mr. Dave Kelly.

19 THE CLERK: Please raise your right hand.

20 **PAUL DAVID KELLY**, having been first duly
21 sworn, testified as follows:

22 THE CLERK: Thank you. Please be seated.

23 For the record, please state your name and
24 spell your last name.

25 THE WITNESS: Paul David Kelly, K-e-e-l-l-y.

DIRECT EXAMINATION

2 BY MR. FRADETTE:

3 Q. Good morning. Is it okay if I call you Dave?

4 A. Yes.

5 Q. Dave, can you tell us where you currently
6 reside?

7 A. 14 Kingswood Circle, Silver Lake,
8 New Hampshire.

9 Q. And where -- what is your current occupation?

10 A. Pharmacist.

11 Q. How long have you practiced pharmacy?

12 A. 39 years.

13 Q. And how many years did you actually practice
14 at Walmart?

15 A. Eight years.

16 Q. And between what years?

17 A. 2003 and 2011.

18 Q. Okay. And you were terminated at Walmart
19 in -- when were you terminated?

20 A. November 1st, 2011.

21 Q. And the reason for termination had to do
22 with an unlicensed technician on your watch?

23 A. That's correct.

24 Q. That was a clear compliance violation; is that
25 correct?

1 A. Absolutely.

2 Q. And did you have any dispute with Walmart
3 about the fact that you were terminated?

4 A. No.

5 Q. During the eight years that you were employed
6 with Walmart, how many were you employed as a market
7 manager?

8 A. Three years.

9 Q. And that's in the health and wellness
10 department?

11 A. That's correct.

12 Q. And as a market manager, how many years did
13 you work under the supervision of Heather McCaffrey?

14 A. About 21 months.

15 Q. 21 months?

16 A. Yeah.

17 Q. And during that over three years as a market
18 manager and 21 months with Ms. McCaffrey, did you become
19 familiar with Walmart's custom and practices in regards
20 to disciplining pharmacists?

21 A. Yes.

22 Q. Similarly during that period of time, did you
23 become familiar with Walmart's customs and practices in
24 regards to firing or terminating pharmacists?

25 A. Yes.

1 Q. Now, with respect to discipline -- I'm sorry.
2 Let me begin again.

3 What was Walmart's custom and practice if a
4 pharmacist reported the accidental loss of his or her
5 pharmacy key immediately upon discovering the loss?

6 MR. KACZMAREK: Objection.

7 THE COURT: Overruled.

8 If you know.

9 Q. You can answer.

10 A. The immediate resolution is to rekey the
11 pharmacy ASAP.

12 Q. Okay. And with respect to discipline
13 involving a pharmacist, what was Walmart's custom and
14 practice in terms of information that would be discussed
15 and reviewed when making a disciplinary decision?

16 MR. KACZMAREK: Objection.

17 THE COURT: Sustained. Maybe you should lay a
18 foundation, his basis of knowledge and so forth.

19 MR. FRADETTE: Sure.

20 Q. Did you participate in the decision ultimately
21 to discipline or terminate a pharmacist while employed
22 at Walmart?

23 A. Yes.

24 Q. And is there a custom and practice within
25 Walmart as to what would be discussed in arriving at

1 that decision?

2 A. Yes.

3 Q. And what is that custom and practice?

4 A. Well, generally speaking, we would take the
5 circumstances that were involved and discuss those with
6 my boss, which would be my regional. We would discuss
7 at what level of coaching that they were already at and
8 make a decision from there.

9 Q. So the -- the meeting or the discussion would
10 include information as to what their coaching was?

11 A. Yes.

12 Q. And would it include information such as leave
13 of absence or recent activity?

14 A. Yes.

15 Q. And based on Walmart's custom and practice in
16 arriving at disciplinary decisions, would the market
17 manager advocate for whatever discipline he or she
18 wanted?

19 MR. KACZMAREK: Objection.

20 A. Yes.

21 THE COURT: Overruled.

22 Q. And, I'm sorry; your answer was?

23 A. Yes.

24 MR. FRADETTE: Nothing further, your Honor.

25 THE COURT: All right. Mr. Kaczmarek.

CROSS-EXAMINATION

2 | BY MR. KACZMAREK:

3 Q. Good morning, Mr. Kelly.

4 A. Good morning.

5 Q. The custom and practice that you just
6 testified to, did you ever discuss that custom and
7 practice with Joseph Certo?

8 A. No.

9 Q. And you indicated that you had been a market
10 health and wellness director for about 21 months; is
11 that right?

12 A. No.

13 Q. I'm sorry.

14 A. Three years.

15 Q. Three years. I'm sorry.

16 A. I was working under Heather for about 21
17 months.

18 Q. You worked under Heather Harris McCaffrey for
19 about 21 months?

20 A. That's correct, uh-huh.

21 Q. Do you know how long Mr. Certo had worked
22 under Heather Harris McCaffrey before the decision was
23 made to give Ms. McPadden skip-level coaching?

24 A. NO.

25 MR. KACZMAREK: Nothing further.

1 THE COURT: All right. Any redirect?

2 MR. FRADETTE: Nothing further, your Honor.

3 THE COURT: Thank you, Mr. Kelly. You may
4 step down and you are excused.

5 (Witness excused.)

6 MR. FRADETTE: Your Honor, the plaintiff has
7 no -- no further witnesses, your Honor.

8 THE COURT: All right. Do you rest?

9 MR. FRADETTE: Yes.

10 | THE COURT: All right.

13 MR. KACZMAREK: That's correct, your Honor.

14 THE COURT: You've covered all your evidence.

15 MR. KACZMAREK: Yes.

23 All right. So that completes -- that will
24 complete the presentation of evidence in the case.

25 We're going to take a short break, maybe 15, 20 minutes,

1 because I need to go over some matters with counsel,
2 and when we return, counsel will have an opportunity,
3 as I told you at the outset, to stand before you and
4 direct -- address you directly once again and make a
5 closing argument in which they will sum up the evidence
6 as it's been received in the context of their respective
7 positions in the case.

8 So we'll take a brief recess.

9 (IN OPEN COURT - NO JURY PRESENT)

10 MR. KACZMAREK: May I be heard, your Honor?

11 THE COURT: Mr. Kaczmarek, even though I kind
12 of forced you into resting, I am holding you harmless
13 with respect to any motions you'd like to make at the
14 close of the plaintiff's case.

15 MR. KACZMAREK: Thank you, Your Honor.

16 Given that the plaintiff's case is closed, as
17 I indicated to your Honor earlier, the defendant moves
18 for what used to be called direct verdict, I suppose now
19 is called judgment as a matter of law.

20 We have discussed with your Honor multiple
21 times throughout the course of this trial our
22 perspective on the evidence and I will be very brief
23 this morning because I know that we want to move things
24 along and get this to the jury.

25 We believe that plaintiff, even taking the

1 inferences in the favor of the plaintiff as the Court
2 should in the context of this sort of motion, we believe
3 that the plaintiff has failed to carry her burden of
4 establishing evidence sufficient to take any of her
5 claims to the jury. And we've argued this and discussed
6 this with your Honor multiple times throughout this
7 week.

8 I would point out that when your Honor denied
9 in part the defendant's motion for summary judgment, you
10 indicated that the plaintiff's case was very thin. I
11 would respectfully submit to your Honor that it's even
12 thinner today than it was represented to you during oral
13 argument on the summary judgment motion. At that motion
14 it was represented to you that there would be comparator
15 evidence with regard to Mr. Certo's supposed differing
16 treatment as to other male employees, specifically
17 Mr. Varieur.

18 There has been no such evidence in this case,
19 your Honor. There's no evidence as -- in -- there's no
20 evidence in the record before the jury, your Honor,
21 regarding any physical outbursts, physical -- violence
22 in the workplace as was represented to your Honor during
23 the summary judgment argument, and to the extent that
24 plaintiff bases her gender claim on the fact that
25 Mr. Varieur was not disciplined in some way for the

1 synthroid error that the jury has heard some evidence
2 about, we would submit that he is not an appropriate
3 comparator for purposes of -- particularly with regard
4 to the gender claim because it is a pure
5 apples-to-oranges comparison. We're talking about the
6 loss of the pharmacy key and we're talking about an
7 error, an error that was actually reported and sort of
8 resolved through the system. There can't be a finding
9 of discrimination based on such dissimilar
10 circumstances.

11 I'm happy to address -- and so I would focus
12 your Honor on that. I'm happy to address any questions
13 your Honor has, but I feel like we've raised these
14 issues in summary judgment, we've raised them with your
15 Honor, and I know we want to move things along this
16 morning, so we respectfully move for judgment on all
17 claims.

18 THE COURT: All right. Thank you,
19 Mr. Kaczmarek. Appreciate it.

20 MR. KACZMAREK: Thank you.

21 THE COURT: Attorney Fradette?

22 MR. FRADETTE: Your Honor, thank you very
23 much.

24 During the course of the trial we have
25 actually made arguments on the record with respect to

1 the points that have been raised. We will be submitting
2 a written opposition as well, but certainly on the issue
3 that was just raised, the --

4 THE COURT: Written opposition to what?

5 MR. FRADETTE: To the --

6 THE COURT: This motion?

7 MR. FRADETTE: Yes.

8 THE COURT: Oh. Your time's now.

9 MR. FRADETTE: Yeah. Okay, your Honor.

10 So the -- I'd call your attention, your Honor,
11 to the standard of review with respect to a Rule 50
12 motion. You -- the Court would generally draw all
13 reasonable inferences in favor of the nonmoving party
14 and it may not rely on the credibility determinations or
15 weigh the evidence. Thus, although the Court should
16 review the record as a whole, it must disregard all
17 evidence favorable to the moving party that the jury's
18 not required to believe.

19 In that regard, Mr. Certo took the stand, as
20 well as Ms. Kulwicki, and they gave explanations for
21 their -- their conduct in the course of the termination
22 decision made on behalf of Ms. McPadden. There's --
23 there's inconsistencies between what Mr. Certo
24 remembers, what Mr. -- what Ms. Kulwicki remembers, what
25 Ms. McCaffrey testified to. They're just all over the

1 place in terms of their explanation for the decision
2 that they reached. We -- we submit, your Honor, that
3 you should disregard all of that evidence in ruling on a
4 Rule 50(a) motion.

5 The standard for a Rule 50 is the same as a
6 standard -- the motion for summary judgment and in the
7 summary judgment motion, your Honor found specifically
8 six -- I won't go through them all, but six factors to
9 support.

10 MS. IRWIN: I think the judge is allowing us
11 to submit this if we can right now.

12 THE COURT: Oh, right, if you can right now.

13 MR. FRADETTE: I understood --

14 THE COURT: You implied that you were going to
15 write a memo and give it to me sometime in the future.
16 And that ship will have sailed.

17 MR. FRADETTE: All right. All right. So we
18 will be submitting a full memo in opposition to --

19 THE COURT: When will you be submitting it?

20 MS. IRWIN: We just haven't done it
21 electronically, but we can submit it to the Court.

22 THE COURT: If you want me to read it, you
23 better hand it to me now. How long is it?

24 MR. FRADETTE: It's 20 pages.

25 THE COURT: Oh, you better make your argument

1 then.

2 MR. FRADETTE: So the six factors that the
3 Court considered in the summary judgment motion are
4 that -- temporal proximity. Fewer than eight weeks
5 after returning from the medical leave, she was fired;
6 prior to that, Ms. McPadden had reported that she
7 believed there were safety issues and the defendant has
8 stipulated they're reasonable and good faith beliefs;
9 that Ms. Fonseca was violating her privacy rights.
10 Mr. Certo neglected to investigate that at all despite
11 Walmart's policy that clearly specifies that a HIPAA
12 violation should be investigated. There's evidence
13 suggesting that Mr. Certo undertook absolutely no
14 investigation. In fact, he testified at the Human
15 Rights Commission that there was no investigation. In
16 this court he answered interrogatories saying that he
17 called a couple of people at the pharmacy and that
18 constituted his investigation. And then you heard
19 testimony that a HIPAA violation would absolutely have
20 produced some kind of a written document evidencing the
21 investigation and there was none produced in this case.
22 There's evidence that suggests that Mr. Certo
23 rarely disciplined employees for violations of Walmart
24 policies; for example, the dispensing error that
25 Mr. Varieur clearly made. There's no dispute, he

1 admitted it, that he was not disciplined for the error
2 and he was not disciplined for failing to report the
3 error. In fact, the evidence suggests that he was
4 trying to blame the error on Maureen and --
5 Ms. McPadden, and that's actually what triggered her to
6 be particularly concerned and pay -- paying closer
7 attention, since now not only was she's worried about
8 public safety, she couldn't trust her partner on the
9 prescription filling bench.

10 And then, when Ms. McPadden accidentally lost
11 her key, there were a flurry of e-mails, I think it was
12 described as, between Mr. Certo and his peers at the --
13 at the Seabrook pharmacy as to accountability for the
14 accidental loss of a key. And that ends up everybody
15 agreeing, among those peers, that it should be a
16 one-level discipline. Mr. Certo himself agrees that it
17 should be a one-level discipline when he thought that
18 Maureen was on a third level, which, of course, one
19 level would have resulted in his being fired -- her --
20 her being fired.

21 Not satisfied with that outcome, he then
22 escalates the matter to Ms. McCaffrey and in that
23 telephone call, he provides misinformation to
24 Ms. McCaffrey specifically so that he could get more
25 than a one-level discipline for an event that his peers

1 agreed would be -- or should be a one-level coaching, if
2 anything. And, of course, predictably, Ms. McCaffrey
3 followed Mr. Certo's lead and authorized the two-level
4 discipline that ultimately resulted in her termination
5 the very next day. In response to Ms. McPadden losing
6 her key, like I mentioned, Mr. Certo was informed that
7 it should be a first-level coaching and it would not
8 have resulted in her termination. Mr. Certo's
9 explanation, again, I suppose -- the defendant's
10 evidence on that point should be disregarded as it
11 relates to the Rule 50 motion, but it certainly was not
12 consistent.

13 There is evidence that a male pharmacist who
14 lost his key to the pharmacy was given a one-level
15 coaching and we know now that Ms. Kulwicki was the
16 decision-maker in his case and authorized the issuance
17 of a one-level key (sic), even knowing that just 12
18 months earlier, which had been called to her attention
19 12 months earlier, the same event resulted in a
20 two-level discipline to Ms. McPadden. And her
21 explanation for the disparity -- the different treatment
22 was that there was a snowstorm or that the pharmacist --
23 primarily, it was a snowstorm when he lost his key and
24 lost it in the parking lot. It was never found.

25 THE COURT: I think I get the gist of it,

1 Mr. Fradette.

2 MR. FRADETTE: Okay.

3 THE COURT: You know, as counsel -- I should
4 say on the record, as counsel know, I've certainly -- I
5 certainly don't see this as a particularly strong case.
6 In fact, I think it's probably the weakest case that I
7 can remember ever sending to a jury. But I'm going to
8 send it to the jury. I -- I really doubt -- I have
9 great doubt as to whether you've satisfied your burden
10 of showing specific facts from which a reasonable person
11 could conclude that not only was the reason given by
12 Walmart not legitimate, but, in fact, was a pretext for
13 actual discriminatory animus of some type.

14 You know, as I've said in chambers to you, it
15 seems to me this is sort of a reverse hourglass kind of
16 a case where, yes, all of that -- all of what you
17 described is in the lower part of the hourglass, you're
18 trying to get it up to the top, and it all goes through
19 Mr. Certo's interaction with Ms. McCaffrey and
20 Ms. Kulwicki. You know, whether -- whether you succeed
21 in making that transition, I guess we'll see. The jury
22 will decide that.

23 What's saving you, I think -- in my view,
24 you're right at the borderline, right on the border
25 between inferences that perhaps can be validly relied

1 upon to find in your favor on one side and mere tenuous
2 insinuations, I think the Court of Appeals refers to it
3 as, which would not entitle you to even have jury
4 consideration.

5 But you're on the border and the Court of
6 Appeals has said in cases like this where it's a pretext
7 case and it devolves down to was the employer's -- was
8 the employer's reason for discharge, can it be
9 challenged and could it be inferred that there might be
10 discriminatory animus as the real cause, the Court
11 should be very cautious in granting judgment to the
12 employer, either summary judgment or on a motion at the
13 end of the evidence, assuming the evidence is the same.

14 So what's saving you is that cautionary
15 language that courts should be cautious about entering
16 judgment in cases such as this. Now, is that to say
17 you're not going to prevail at all? You might prevail.
18 You might prevail. That'll be up to the jury.

19 So motion's denied. And I assume the same
20 motion you're going to -- why don't you make the same
21 motion now because we've closed the evidence as well.

22 MR. KACZMAREK: Correct, your Honor.

23 THE COURT: Right. For the same reasons --

24 MR. KACZMAREK: For the same reasons
25 previously articulated both this morning and in the

1 prior conversations with the Court, defendant moves for
2 judgment as a matter of law.

3 THE COURT: All right. And for the same
4 reasons I've just articulated, the motion's denied.

5 MR. KACZMAREK: Thank you.

6 THE COURT: Do you want to go through the
7 motions of making a -- a motion for judgment as a matter
8 of law on the behalf of plaintiff or can we skip that
9 part?

10 MS. IRWIN: We can skip that part, your Honor.

11 THE COURT: Okay. Why don't we take a --

12 MR. FRADETTE: Note my objection.

13 THE COURT: Why don't we take a brief recess
14 and when we return -- what do you need, ten minutes --

15 MR. KACZMAREK: Ten minutes would be great.
16 Thanks, your Honor.

17 THE COURT: -- and we'll have final arguments.

18 (Recess.)

19 (IN OPEN COURT - NO JURY PRESENT)

20 THE COURT: Do you want me to tell them about
21 the discrimination claim being out before you argue,
22 just so they -- or do you want me to tell them before
23 the instructions? Up to you, both of you.

24 MS. IRWIN: I was going to address it.

25 MR. KACZMAREK: I think your Honor should just

1 mention it.

2 THE COURT: Before you argue?

3 MR. KACZMAREK: Before we argue.

4 THE COURT: Okay.

5 MR. KACZMAREK: Just so they're clear.

6 MS. IRWIN: And I think we talked that the
7 disability claim is no longer before them.

8 THE COURT: I was just going to say the
9 plaintiff's disability discrimination claim is no longer
10 before you and need not be considered by you for any
11 purpose.

12 MS. IRWIN: Great.

13 MR. KACZMAREK: Excellent. Thank you, your
14 Honor.

15 (IN OPEN COURT - JURY PRESENT)

16 THE COURT: Ladies and gentlemen, we've
17 completed the presentation of evidence, as you know, and
18 now counsel once again have an opportunity to stand
19 before you and speak to you directly and review with you
20 the evidence that actually has been presented in the
21 case in the context of their respective positions on the
22 issues.

23 Before we begin, let me just cover a couple
24 things. One, you've heard reference to a disability
25 discrimination claim that plaintiff asserted. That

1 claim is no longer before you and need not be considered
2 by you for any reason or any purpose.

3 Secondly, during the course of the trial,
4 you've I'm sure noticed, obviously, counsel for both
5 sides have occasionally raised objections and I've ruled
6 on those objections. You should understand that counsel
7 have an obligation or duty to their respective clients
8 to raise issues of law with me when they think it's
9 appropriate and so you shouldn't hold it against
10 client -- you shouldn't hold against either counsel the
11 fact that they were raising objections to the evidence.
12 It's just a shorthand way of raising a legal issue with
13 me that then I ruled on.

14 I've already told counsel privately, I'm happy
15 to tell you publicly, I think they've both done a
16 remarkably good job representing -- an excellent job
17 representing their respective clients and I'm confident
18 that they've presented to you all the relevant evidence
19 that you need to have before you to revolve these
20 issues.

21 Please just keep in mind that while counsel's
22 closing arguments are intended to help you understand
23 the evidence and its significance in the context of
24 their respective positions, their closing arguments,
25 like their opening statements, are not themselves

1 evidence. The evidence is as you find it to be and
2 the -- and the -- obviously the verdict is yours and
3 yours alone to return.

4 All right. With that, I'd invite counsel to
5 begin.

6 Let me also say in civil cases in federal
7 court the roles -- the order is reversed on closings
8 from openings. Because the plaintiff always retains the
9 burden of proof in the case, plaintiff is -- argues
10 last. So in closings, defendant argues first, then
11 plaintiff argues. Okay?

12 Mr. Kaczmarek, are you prepared?

13 MR. KACZMAREK: Thank you, your Honor.

14 CLOSING ARGUMENT BY ATTORNEY KACZMAREK

15 MR. KACZMAREK: Good morning. Let me begin by
16 thanking you. I want to thank you for your patience as
17 I fumbled through the ELMO, your patience as we moved
18 courtrooms, your patience for sitting through two
19 videotaped depositions. I know that that was a lot for
20 you to soak in, a lot for you to deal with, and I
21 appreciate that. I appreciate your time and your
22 attention to all the evidence that we've seen in this
23 case.

24 Remember last week when I gave my opening? I
25 told you what the evidence would show. I told you that

1 the evidence would show that Ms. McPadden lost her
2 pharmacy key. And you heard her testify to that fact.
3 That fact is undisputed.

4 And I told you in my opening statement that
5 the evidence would show that neither Joe Certo nor any
6 of his Division 1 colleagues that he exchanged e-mails
7 with, nor his boss, Heather Harris McCaffrey, nor
8 Barbara Kulwicki, the head of HR for the eastern
9 United States of the Health and Wellness Division of
10 Walmart, had ever heard of a staff pharmacist at Walmart
11 losing their pharmacy key. That's what I told you in my
12 opening statement the evidence would show and, ladies
13 and gentlemen, that is exactly what the evidence showed.
14 You heard testimony from all three of those individuals
15 regarding that fact.

16 I also told you in my opening statement that
17 the evidence would show that Ms. McPadden was on an
18 active second written coaching as of the day she lost
19 that pharmacy key. And you heard testimony from
20 Ms. McPadden herself and you saw documents in the form
21 of Defendant's Exhibit A and B establishing that fact.

22 I also told you that the evidence would show
23 that it was part of Ms. McPadden's job as a staff
24 pharmacist to help keep the pharmacy secure. And you
25 heard testimony establishing that not only is it her

1 obligation as an employee -- as a staff pharmacist at
2 Walmart, it's also a professional obligation that she
3 has as a pharmacist licensed by the Board of Pharmacy of
4 New Hampshire.

5 And I told you that the evidence would show
6 that there is no Walmart policy that specifically says
7 if you lose your pharmacy key, then you will receive
8 this level of coaching. I told you there was no such
9 policy and, ladies and gentlemen, we certainly heard
10 lots of testimony that there is no exact policy on that
11 point.

12 And I also told you that the evidence would
13 show that on Tuesday, November 27th, 2012, Mr. Certo
14 informed Ms. McPadden that because she had lost her
15 pharmacy key and she was already on a second written
16 coaching, her employment was being terminated. And you
17 heard testimony from Ms. McPadden and Mr. Certo
18 establishing that that is exactly what she was told on
19 Tuesday November 27th, 2012 in that meeting at the
20 Seabrook pharmacy when she was fired. You also saw
21 documentary evidence of that fact in the form of
22 Plaintiff's Exhibit 17, the exit interview form that
23 Ms. McPadden testified that she saw upon her
24 termination.

25 Let me pause right there.

1 Despite all the interrogatory responses you've
2 seen, the deposition transcripts that you've heard
3 about, the repeated questions from Ms. McPadden's
4 attorneys, the fact remains that Joe Certo told
5 Ms. McPadden that she had lost her -- that because she
6 had lost her pharmacy key while she was on a second
7 written coaching, her employment was being terminated.
8 Both Ms. McPadden and Mr. Certo testified that that is
9 what she was told at her termination meeting on
10 November 27, 2012 and Mr. Certo and Ms. McCaffrey
11 testified at trial that this is why Ms. McPadden was
12 fired. That was what they told her at the termination
13 meeting, that's what they told her during trial --
14 that's what they told you, the jury, during trial
15 through their testimony. Those are facts and they're
16 all in evidence and they're all there for you to
17 consider in your deliberations.

18 As a result, what's really at issue here
19 are the events that occurred between the morning of
20 November 26th when Ms. McPadden reported her pharmacy
21 key lost to Joe Certo and the morning of November 27th
22 when Mr. Certo told Ms. McPadden that she was being
23 terminated as a result of having lost that key. And
24 when you look at those events carefully, the evidence
25 related to those events, I'm confident that you will

1 find that plaintiff's four remaining theories simply do
2 not hold up.

3 Before I talk about the events of
4 November 26th and November 27th, I think it's important
5 to emphasize two points. First, Ms. McPadden is the one
6 bringing this lawsuit. She bears the burden of
7 establishing the elements of her remaining claims by a
8 preponderance of the evidence. You'll hear instructions
9 from the Court about what that means in a little while,
10 but it's about evidence. She has to have evidence to
11 support her claims. Not conjecture, not speculation,
12 not guesses, not statements or questions from counsel.
13 Evidence.

14 Second, although you've heard from a number of
15 witnesses, Ms. McPadden's theory is that Joe Certo, not
16 Barbara Kulwicki, not Heather Harris McCaffrey,
17 discriminated and/or retaliated against her for a number
18 of different reasons. So for you to enter a verdict in
19 Ms. McPadden's favor, you must conclude, among other
20 things, that she established by a preponderance of the
21 evidence that Mr. Certo harbored some sort of
22 discriminatory or retaliatory intent against her.
23 Ladies and gentlemen, there is no such evidence.

24 If Joe Certo harbored this discriminatory or
25 retaliatory intent against Ms. McPadden, he had every

1 opportunity to act on that before November 26th, 2012.
2 He didn't need to wait for her to lose her pharmacy key.
3 If the conditions in Seabrook truly were as bad as
4 Ms. McPadden claimed they were in the fall of 2012,
5 Mr. Certo could simply have chosen to tour the facility
6 while she was on duty, identified some sort of problem,
7 and coach her for it. But he didn't.

8 Take a look at Plaintiff's Exhibit 47, which
9 I'm going to show you right now and which you'll have
10 with you in your deliberations.

11 Plaintiff's Exhibit 47 is an e-mail string.
12 And the original e-mail, which starts on the second
13 page, goes onto the third, is from Josh Varieur to
14 Maureen McPadden, November 19th, 2012 and he copies
15 Joe Certo. And on the second page of this e-mail, what
16 does Mr. Varieur say? We need to make sure that we're
17 keeping our -- making -- that we're working with our
18 associates to make sure that tasks are getting done.
19 Monday morning I came in to two days' backup of day 10s,
20 22 log copies from previous dates, two recall web forms
21 not completed, outdates for November not completed,
22 three transactions for POS and other things not
23 completed. Lots of things not completed on
24 Ms. McPadden's watch. One of them were log copies, the
25 exact same thing for which Ms. McPadden received

1 coachings the year before from Janice Urbanski.

2 Any of those issues, any of those issues,
3 which were at -- which were in place in Seabrook in
4 October and November of 2012, any of those issues would
5 have been grounds to issue a coaching to Ms. McPadden.
6 Any of them. But did he coach her? No.

7 He also didn't coach Mr. Varieur for those
8 same problems. They were happening on both
9 Mr. Varieur's watch and on Ms. McPadden's watch. Right?
10 Both of them were having difficulty dealing with things
11 in the Seabrook pharmacy. And Mr. Certo didn't coach
12 either of them because he knew that they were trying to
13 make the best of a difficult situation. He knew that
14 Josh Varieur was an inexperienced manager. He knew, as
15 he testified to, that he was stretched thin. After
16 putting this inexperienced manager in place, he suddenly
17 had his territory expanded. He was covering two
18 different markets. He didn't have as much time as he
19 would have liked to spend in Seabrook.

20 He did the best he could. He approved
21 overtime for technicians, he worked his contacts within
22 Walmart to try and get technicians from other pharmacies
23 to help out in Seabrook, he paid for travel time for
24 those technicians, he even obtained 20 additional
25 pharmacist hours above his allocated budget to help out

1 in Seabrook. And he shared his experiences with
2 Mr. Varieur to try and make him a better manager. And
3 he didn't hold Mr. Varieur accountable for the
4 deficiencies in Seabrook and he didn't hold Ms. McPadden
5 accountable for the deficiencies in Seabrook because he
6 knew they were trying to work through it together.

7 But, ladies and gentlemen, there's no dispute,
8 you heard testimony, that if Mr. Certo wanted to coach
9 Ms. McPadden, he could have. He had that authority. At
10 any point he could have done another tour of Seabrook or
11 even just acting upon the e-mails that he received from
12 Mr. Varieur simply issued her a coaching. If his intent
13 was to -- if he had some discriminatory intent or
14 retaliatory intent, he had every opportunity to act on
15 that. And he didn't. He didn't. He didn't act on it
16 because he didn't have that intent and there's no
17 evidence of that intent.

18 Now, let's talk about the events of
19 November 26th. First, the e-mails. That morning, on
20 November 26th, Ms. McPadden e-mails Mr. Certo and says
21 she lost her key. Undisputed. It's also undisputed
22 that Mr. Certo could have coached her on his own without
23 checking with anyone right then and there. The moment
24 she sends that e-mail, he could have said, a-ha, this is
25 it, this is what I've been waiting for. Think about it.

1 This is their theory, that Mr. Certo is out to get
2 Ms. McPadden.

3 Does he -- does he fire her right away? Does
4 he immediately say, start the process for getting her
5 fired? No. He could have, and if he -- I'll submit to
6 you that if he really harbored that kind of
7 discriminatory intent, he could have and would have.
8 But he didn't.

9 Instead, what does he do? He engages in some
10 back-and-forth with his Division 1 colleagues and a
11 number of them expressed their opinion that under the
12 Division 1 Key Control policy, which you'll have in
13 front of you in the jury room, a first-level coaching is
14 appropriate.

15 Now, you heard Mr. Certo testify that he
16 agreed in his opinion as a new -- as a relatively new
17 manager that he thought a level-one coaching was
18 appropriate. He testified to that fact. He put that
19 fact down in the e-mail.

20 Ladies and gentlemen, if Mr. Certo really
21 wanted to get Ms. McPadden fired, why would he put in an
22 e-mail that he agreed with the first-level coaching
23 without first checking on her coaching status? You
24 heard testimony from Mr. Certo and I believe from
25 Ms. Kulwicki that it would take really no time at all to

1 check on her coaching status. Two -- two minutes, I
2 think someone said. And he didn't -- he didn't -- if it
3 is his master plan to get rid of Ms. McPadden, he didn't
4 check on her coaching status, a quick, two-minute check?

5 Ladies and gentlemen, according to their
6 theory of this case, Mr. Certo wanted to get rid of
7 Ms. McPadden since August when she sent that e-mail
8 indicating that she was documenting her safety concerns,
9 or since she requested FMLA leave in September, or at
10 least since she had had that meeting with him in October
11 when she raised a HIPAA issue. But according to them,
12 this person who is out to get Ms. McPadden and had the
13 authority to get rid of her never once bothered to check
14 on her coaching status, not once, even though the
15 undisputed testimony is that it would only take him a
16 minute or two to look it up on the computer. Instead
17 they would have you speculate without any actual
18 evidence in the record that he didn't check on her
19 coaching status until after he e-mailed his Division 1
20 colleagues on November 26th indicating that he had
21 agreed to a level-one coaching. Does that make sense?

22 Ms. McPadden also would have you believe that
23 Mr. Certo only e-mailed Ms. McCaffrey because he thought
24 she would be willing to issue more than a one-level
25 coaching. Let's think about that. The argument you'll

1 hear is that he contacted Heather Harris McCaffrey
2 because he thought she'd be a stickler, that she'd come
3 down with a harsh punishment, harsher than a first
4 level. Well, if that's true -- if that's true, if
5 that's what he believed about Heather Harris McCaffrey,
6 and if Joe Certo really wanted to get Ms. McPadden
7 fired, why not reach out to her first? Why not just
8 call Heather Harris McCaffrey and say, can you believe
9 it, she lost her pharmacy key, that's outrageous. He
10 didn't do that. No evidence of that. He could have
11 just forgotten about all this back-and-forth with
12 Division 1 and gone straight to Ms. McCaffrey, but he
13 didn't.

14 For that matter, if Mr. Certo was hoping to
15 get Ms. McPadden fired, then reaching out to
16 Ms. McCaffrey is a bit of a Hail Mary play. A Hail Mary
17 play. He'd only been on the job for seven months. For
18 all he knows, Ms. McCaffrey has dealt with this exact
19 situation before and only given a first-level coaching.
20 He has no idea what she knows. Why take the risk? Why
21 take the risk? Why involve Ms. McCaffrey at all? He
22 had the authority to issue a skip-level coaching if he
23 wanted to. That's undisputed. But he didn't. Why take
24 that risk? Doesn't it make far more sense that as
25 Mr. Certo testified, that since he'd only been on the

1 job seven months or so and he'd never dealt with this
2 situation before, and none of his Division 1 peers had
3 dealt with it before, that he would reach out to his
4 boss for guidance, a boss who'd been in that role far
5 longer than he had been in his role? Yeah.

6 About that e-mail to Ms. McCaffrey. This
7 e-mail, which you'll have in your -- in the jury room
8 with you, is page 16 of Plaintiff's Exhibit 7. It's
9 also Defendant's Exhibit C.

10 I'm going to fumble with this right to the
11 end. Excuse me.

12 This is the e-mail. This is the moment when,
13 according to them, Joe Certo acts on his discriminatory
14 and retaliatory animus. This is his moment; this is the
15 chance he's been waiting for. What does he say? Is
16 there accountability on that? Is there accountability
17 on that? I don't know; Ms. McCaffrey, you tell me, is
18 there accountability on that? Not she should get a
19 second-level coaching, not even she should get a
20 coaching. No descriptors about how bad it was that she
21 lost her key, no discussion about security of the
22 pharmacy, just a question. Not a recommendation, not a
23 request, not advocacy. A question.

24 If he really had wanted to discriminate or
25 retaliate against her, if he really had that in his

1 heart, he could have just imposed a second-level
2 coaching. He could have said, the folks in Division 1
3 say level one, I think level two. He could have said
4 nothing about Division 1 and said, I think level two.
5 He could have said, I think she should be fired. He
6 could have commented on it. He didn't. He just asked a
7 question. He was a new manager. He just asked a
8 question. He was looking for guidance. He wasn't
9 looking to discriminate or retaliate.

10 Second, the time stamp. You heard Mr. Certo
11 testify that he has no idea in which order the e-mails
12 were sent. He doesn't -- he doesn't know if he sent
13 this e-mail before, after, during all those other e-mail
14 exchanges. It was clearly all that morning, but which
15 came first we'll never know. But, for what it's worth,
16 11:35 a.m. on this e-mail, in the "I agree" e-mail,
17 which is also in Plaintiff's Exhibit 57, I believe, time
18 stamped 11:53 a.m., 18 minutes later. It's at least
19 possible he reached out to her before sending -- that he
20 reached out to Ms. McCaffrey before sending that "I
21 agree" e-mail.

22 In any event, he didn't say, oh, I definitely
23 reached out to her before I sent that "I agree" e-mail.
24 No. He admitted, I don't know; this is an e-mail issue
25 that comes up from time to time; I don't know how it

1 happens; I can't recall what happened exactly in what
2 order on November 6th (sic), 2012, so I don't know. But
3 it's possible.

4 In any event, you heard him testify that as
5 new market director having been on the job for less than
6 eight months at this point, he just wanted to reach out
7 to Heather Harris McCaffrey to obtain some guidance.
8 That's the e-mail.

9 Now let's talk about the conference call.

10 Remember in my opening I told you that the
11 evidence would show that Joe Certo, Heather Harris
12 McCaffrey, and Barbara Kulwicki all had different -- all
13 would have different memories about what was said during
14 that conference call? Some of them remember some
15 details, some of them remember other details, sometimes
16 they conflict, sometimes they agree. You certainly
17 heard that come through loud and clear during the course
18 of this trial, ladies and gentlemen. They have
19 different memories about that phone call.

20 But what does that show? That phone call was
21 over three years ago. Do you remember the exact details
22 of what you were doing on November 26th, 2012, November
23 2013, November 2014? Do you remember what you had for
24 breakfast last week? We all know that memories are
25 fallible. Would it have been great if they'd all

1 written down notes of exactly what has said? Yeah, it'd
2 be great. It'd be great. It'd be wonderful. We could
3 just compare A to B to C. Instead, we have to rely on
4 memory. And we all know that memory is faulty.

5 But what does Joe remember about that call?
6 What does Joe Certo, the local person who knows
7 Ms. McPadden, who's closest to the situation? Well,
8 let's start with the fact that he's the only one of the
9 three that remembers that he was on the call. Think
10 about that. Think about that when Attorney Irwin gets
11 up here and starts talking about some kind of cover-up.
12 Mr. Joe Certo admits he was on the call. If he was
13 trying to try and lie and somehow insulate himself from
14 this whole decision-making process, he'd never admit to
15 being on the call.

16 Remember Attorney Irwin's loaded question
17 suggesting that it would be better if Walmart -- for
18 Walmart if Joe Certo was not involved? Well, he
19 testified under oath he was on that call. He remembers
20 it. He didn't do a lot of talking because he had his
21 boss and the head of HR for the whole east coast on that
22 call, but he was on that call. And since he was on that
23 call, if he really wanted to fire her, why wouldn't he
24 have been more vocal? Why wouldn't he have advocated
25 for a skip level? Instead, Ms. Kulwicki and

1 Ms. McCaffrey don't remember him being on the call at
2 all.

3 Now, I suppose that we could hear some
4 argument that Heather Harris McCaffrey and -- Heather
5 Harris McCaffrey and Barbara Kulwicki are lying under
6 oath because of some unarticulated desire to protect Joe
7 Certo. But, again, those aren't facts. That's just
8 speculation.

9 You heard from Mr. Kelly this morning that
10 it's some -- that in his opinion, as a person who
11 predated Mr. Certo in the market manager -- market
12 director role, that in his opinion, it was custom and
13 practice to advocate for an associate when you're on a
14 phone call like this. Well, that may be his custom and
15 practice, but there's certainly no evidence and you saw
16 me ask him, well, did you ever talk about that custom
17 and practice with Joe Certo? Nope.

18 Joe's a new manager; he was learning the
19 ropes; he sends an e-mail saying, is there
20 accountability on that. You know, there's no evidence
21 that in the way Joe Certo approached the situation that
22 he treated this situation with Ms. McPadden any
23 differently than he had treated any other disciplinary
24 situation involving any other associate.

25 And, again, if Mr. Kelly is correct, it would

1 have been his -- Mr. Certo's obligation, if you will, to
2 advocate for Ms. McPadden during that conference call.
3 To advocate. Well, he could have advocated for a
4 second-level coaching. But he didn't. He didn't. He
5 didn't say anything. He said so little that the other
6 two people on the call don't even remember he was on it.
7 Surely they would have remembered if he had advocated
8 for a skip-level coaching.

9 They would have you believe that Joe Certo,
10 who had waited apparently months for the opportunity to
11 discriminate or retaliate against Ms. McPadden, after
12 waiting all those months, he chose to act out his intent
13 by saying nothing; by saying nothing, and just crossing
14 his fingers and hoping that someone on that phone call
15 would make the decision to issue a skip-level coaching.

16 Now, Mr. Certo, the person most likely -- the
17 person who certainly remembers himself being on that
18 call, testified that he thought the decision to issue a
19 skip-level coaching was a little harsh, so he asked
20 Ms. McCaffrey for the opportunity to call Ms. McPadden
21 to look for the key that night. He testified, you heard
22 him, that if she could find the key, maybe he could
23 bring the coaching down to a first level. He's
24 advocating on her behalf. And Ms. McCaffrey says, go
25 ahead.

1 Now, ladies and gentlemen, this is
2 particularly important because it's undisputed that
3 Ms. McPadden's first and only telephone call with
4 Joe Certo on November 26th was that evening. There's no
5 evidence of any other phone calls in the record that
6 day. Their prior communications that day were by
7 e-mail, e-mails that you've seen. Mr. Certo and
8 Ms. McPadden both testified that on the evening of the
9 26th, Mr. Certo called Ms. McPadden and asked her to
10 tear her house upside down to look for that key. You
11 even heard Mr. McDevitt talk about the search that
12 evening. Why on earth would Mr. Certo ask Ms. McPadden
13 to look for a pharmacy key if the decision to terminate
14 had already been made; if the locks had already been
15 changed?

16 According to the theory that you're going to
17 hear from Ms. Irwin, Mr. Certo had already gotten what
18 he wanted. The decision to fire her had already been
19 made. The only logical explanation for Mr. Certo's
20 request to Ms. McPadden to go find that key is what
21 Mr. Certo testified to, that he had asked Ms. McCaffrey
22 for the opportunity to call Ms. McPadden to look for the
23 key that night so that hopefully she'd find it and he
24 could say, look, it was -- the pharmacy remains secure
25 because we found the key. That's not the act of someone

1 who wants to discriminate. It's not the act of someone
2 who wants to retaliate. It's the act of someone who's
3 trying to help someone out. He was trying to help
4 Ms. McPadden out.

5 Now, I know you heard Ms. McCaffrey testify
6 that Mr. Certo told her before making the phone call --
7 before the phone call with Ms. Kulwicki that when
8 Ms. McPadden was moving, she lost her key and she didn't
9 take it seriously. You heard that testimony by
10 videotape. That's her testimony. But there's no
11 reference to Ms. McPadden moving in e-mails. Mr. Certo
12 didn't find out until that evening when he called her to
13 tell her to look for the key later that day. That's
14 when he found out she had been moving, after the store
15 had been rekeyed. He testified that he did not tell
16 Ms. McCaffrey that Ms. McPadden was not taking the issue
17 seriously until the next morning when he called her to
18 let her know that Ms. McPadden was unable to find the
19 key. And Ms. Kulwicki testified that there was no
20 discussion during the conference call between the three
21 of them about the issue of whether Ms. McPadden took the
22 loss of her key seriously or not. Instead, the focus
23 was on the conduct, the loss of the key itself. Thus,
24 it appears that Ms. McCaffrey's combined memories of
25 these calls, there's simply no way Mr. Certo could have

1 told her that she had lost the key moving in the morning
2 when he was completely unaware of that fact until the
3 evening.

4 You also heard some speculation that Mr. Certo
5 was going to partner with Henry Hamilton, a member of
6 human resources, because a member of human resources
7 needs to be present for a termination of a staff
8 pharmacist. But that's not true. That's speculation.

9 You heard Ms. Kulwicki testify that any member of
10 management could witness a coaching or termination. It
11 doesn't have to be a human resources person like Henry
12 Hamilton.

13 So Ms. McPadden goes home after her shift, she
14 and her boyfriend turn the house upside down. They
15 can't find the key. The next morning, Ms. McPadden
16 e-mails Joe Certo to say she could not find the key. He
17 then calls Ms. McCaffrey and in this conversation he
18 tells her she is not taking it seriously.

19 And that makes sense because he was asking her
20 to find a key that didn't work anymore. And he didn't
21 tell her why. Right? He didn't explain, please, go
22 find this key because you're going to get a skip-level
23 coaching and I really want to advocate for you. He
24 didn't tell her that. He could have. I don't know why
25 he didn't. There really was no testimony exactly as to

1 why he didn't. But the fact is he didn't tell her why.
2 And so I don't know how seriously she treated it.
3 You -- that night. She certainly looked all over for
4 it. Would she have looked harder if she had been told
5 that she might get a coaching? Perhaps. Perhaps.

6 But, in any event, after Mr. Certo tells
7 Ms. McCaffrey that she couldn't find the key and that,
8 by the way, she's on a second active-level coaching, he
9 says to her, you know what this means, active
10 second-level coaching, I give her a skip level, she's
11 going to be terminated. And Ms. McCaffrey, you heard
12 her, said, go ahead; go ahead and fire her. Why?
13 Because in her mind, the focus was on the conduct; not
14 the status of the person, not the person's background,
15 not whether the person has engaged in any sort of
16 legally protected activity. The focus is on the
17 conduct. And if you start making exceptions or changing
18 coaching decisions and levels of accountability based on
19 individual characteristics regarding the person who
20 committed the offense, then what do you have? Then you
21 have willy-nilly decisions about disciplinary actions
22 instead of Walmart's attempts -- difficult though they
23 are given how many associates they have -- Walmart's
24 attempts to try and be consistent. Think about that.

25 Again, the decision had already been made. If

1 he really wanted to discriminate against Ms. McPadden,
2 why call Heather Harris McCaffrey again the next morning
3 and say, you know what this means; this means
4 termination. For all he knows, she might say, you know
5 what, I spoke to someone last night and I -- someone
6 else told me about a situation involving this exact same
7 scenario, you know, it's only a first level. Again, it
8 was -- if he wanted to get her fired, he'd already done
9 so. There was no need for him to call Heather Harris
10 McCaffrey on the morning of the 27th. Why give her an
11 opportunity to reconsider that decision? Why.

12 Ladies and gentlemen, you've heard a lot of
13 testimony during this trial. What you haven't heard is
14 anyone say one bad thing about Maureen McPadden. Not
15 one. Maybe some comments about some log copies that
16 apply to lots of people, but not one bad thing about
17 Ms. McPadden. But that doesn't mean she was
18 discriminated against and that doesn't mean that she was
19 retaliated against for requesting FMLA leave, or
20 complaining about HIPAA, or complaining about conditions
21 in the pharmacy. It's her burden to prove those claims
22 and she hasn't carried her burden. The evidence will
23 show -- the evidence showed that at the time of the
24 decision, Heather Harris McCaffrey and Barbara Kulwicki
25 had absolutely no knowledge that Ms. McPadden had

1 complained about the HIPAA violation or that she'd
2 complained about conditions in Seabrook. Ms. McCaffrey,
3 who's currently on her third FMLA leave, testified that
4 she was unaware of Ms. McPadden's FMLA requests and the
5 fact that she'd taken leave at the time that she made
6 the decision to issue the skip-level coaching. And
7 there certainly is no evidence, ladies and gentlemen,
8 that these two women discriminated against Ms. McPadden
9 because of her gender.

10 Again, Ms. McPadden claims that it's Joe
11 Certo, not Heather Harris McCaffrey or Barbara Kulwicki,
12 who's the bad guy here. But what's the evidence of
13 that? What's the evidence? Not speculation, not
14 guesswork. What's the evidence that Joe Certo had some
15 form of discriminatory or retaliatory intent? There is
16 none.

17 I asked Ms. McPadden whether she had ever
18 heard any negative complaints or negative statements
19 about the fact that she'd taken FMLA leave and she said
20 no. She also testified, and you saw it in evidence,
21 that Walmart has a policy prohibiting discrimination, a
22 policy that Ms. McPadden was aware of. And that policy,
23 which is Plaintiff's Exhibit 66, expressly prohibits any
24 kind of discrimination and, more importantly, it
25 provides an avenue for Ms. McPadden and other associates

1 to complain if they feel like they're being
2 discriminated or retaliated against in the workplace.
3 She doesn't have to complain to Joe Certo, her direct
4 manager -- or her next level manager if she feels like
5 Mr. Certo's discriminating against her or retaliating
6 against her. And she doesn't have to go to Josh
7 Varieur, who reports to Mr. Certo, either. She can go
8 to another level of management or she can call this
9 1-800 number and have -- make an anonymous complaint and
10 she can pursue that route.

11 And she testified, Ms. McPadden testified,
12 that she was aware that Walmart had a policy prohibiting
13 discrimination and she testified that she was aware that
14 she -- there was a mechanism for her to make a complaint
15 if she felt like she was being discriminated against.
16 And she also testified that she never made any complaint
17 of that kind. Never. Not once.

18 Now, about Ms. McPadden's legal claims, her
19 four legal claims which you'll hear some instructions
20 from the jury about -- from the Court about after
21 Ms. Irwin gives her closing.

22 Her first claim is gender discrimination.
23 And, really, what she relies upon here is the Andy Tau
24 situation that you heard testimony about. You saw the
25 videotape from Mr. Tau, you saw the e-mail exchange

1 between Barbara Kulwicki and Lurene Riel. And I -- I
2 guess what Ms. McPadden's attorneys will say is that,
3 look, this is an example of a market manager advocating
4 on behalf of an employee who lost their key and that
5 person only got a first-level coaching. Well, that's
6 great. That's great. That's Ms. Lurene Riel's decision
7 to send that e-mail. But there's absolutely no -- no
8 suggestion in the record, first of all, that Joe Certo
9 was involved in that Andy Tau situation. It's not like
10 he said, you know, I think this, and then changed his
11 mind about that. They're completely different
12 scenarios. He was not involved in the Andy Tau
13 situation whatsoever and there's certainly been no
14 suggestion in the evidence that he was.

15 That decision, made a full a year after
16 Ms. McPadden's termination, was made by the manager
17 responsible for Mr. Tau's pharmacy, a woman named Lurene
18 Riel. The fact that she chose to handle the situation
19 one way is no evidence of Mr. Certo's discriminatory
20 intent. Right? For all we know, that was Ms. Riel's
21 way of handling things. Maybe she'd never handled it
22 that way before. We don't know. But there's certainly
23 no evidence that Joe Certo had a policy or practice of
24 sending those kinds of lengthy e-mails up -- up the
25 chain, if you will, to advocate on behalf of employees.

1 There's no suggestion that he deviated in any way from
2 his standard practices in dealing with associates.
3 Ladies and gentlemen, the Andy Tau situation has
4 absolutely no relevance here to the central question
5 that you're being asked to decide: Did Joe Certo have
6 discriminatory or retaliatory intent? How can you find
7 intent of Mr. Certo based on a decision in which he was
8 not even involved? It's simply a reflection of a
9 different management style.

10 And I think I should also point out to you
11 that Andy Tau, who you heard from by video, he testified
12 that he expected to be coached for losing his key. His
13 first manager had told him that it's a very serious
14 issue to lose the key. He knew it was coming. He
15 expected to be coached. So is there any surprise that
16 Ms. McPadden got coached for losing her key as well?

17 I suppose you'll hear some argument that the
18 Andy Tau situation is important because Andy Tau was a
19 man, is a man, and Mr. Certo -- and Ms. McPadden is a
20 woman, and they were treated differently. Again,
21 treated differently by different people. And, in any
22 event, I think it's important for you to know that to
23 the extent Ms. McPadden argues that this is relevant to
24 her gender discrimination claim, Ms. -- Mr. Certo
25 testified under oath -- who replaced Maureen McPadden as

1 a -- as the staff pharmacist in Seabrook? Diane Libby,
2 a woman, and he was involved in that decision. If he
3 had some sort of deep-seated gender bias, why would he
4 hire a woman to replace Ms. McPadden? Why would he do
5 that? It's because he didn't have that bias. There's
6 no evidence of it.

7 Now, the other thing that you'll hear some
8 argument about is Josh Varieur. Well, ladies and
9 gentlemen, Josh Varieur was not a decision-maker with
10 regard to the decision to issue the skip-level coaching
11 to Maureen McPadden. He was completely uninvolved. And
12 to the extent you hear some argument that Mr. Varieur
13 was not coached for some things that he did, I'll
14 respectfully submit to you that during that same time
15 period, as I discussed at the beginning of this
16 argument, that Ms. McPadden was doing some of the exact
17 same things that Mr. Certo (sic) was doing, like log
18 copy issues and he wasn't coached -- and she wasn't
19 coached for them either. So that comparison simply
20 doesn't go very far.

21 Now, Ms. McPadden also has an FMLA claim. She
22 claims that Mr. Certo, once she came back from her FMLA
23 leave and told him that she might need some leave in the
24 future, that he didn't like that, that would make her
25 job difficult. Well, again, ladies and gentlemen,

1 that's just speculation because there's no evidence in
2 the record that Mr. Certo had any trouble finding a
3 floater pharmacist to cover the pharmacy either when she
4 was out on leave or at any point. There is no evidence
5 suggesting that that was difficult for Mr. Certo to do.

6 You heard testimony from Ms. McPadden that as
7 a floater pharmacist at CVS, she's desperate to try and
8 pick up hours. She wants as many hours as she can get.
9 Well, there are floater pharmacists, as you heard
10 Mr. Certo testify, at Walmart who exist specifically for
11 these kinds of situations, to float. If -- if someone
12 goes on vacation, if someone goes on a leave of absence,
13 those floaters are there to pick up the slack because
14 things happen. People have children, people get sick,
15 they need to be out. And to cover for the pharmacy,
16 they have floater pharmacists. There's no evidence that
17 Mr. Certo viewed Ms. McPadden's FMLA leave or request
18 for leave or the fact that she might take additional
19 leave in the future, that he viewed that as some sort of
20 negative.

21 HIPAA. I don't know if you'd ever heard of
22 HIPAA before this case. You heard a fair amount about
23 it during this case. One of Ms. McPadden's theories is
24 that Mr. Certo retaliated against Ms. McPadden because
25 she complained about the HIPAA issue -- that she

1 complained about the fact that a technician in Seabrook
2 had made some mention about her prescription or her
3 medical condition or why she was on a leave of absence.

4 Ladies and gentlemen, it's undisputed that
5 Mr. Certo made a mistake. He didn't follow the HIPAA
6 policy. He should have absolutely referred that matter
7 to the HIPAA team and he didn't. It's also true that
8 the evidence in the record shows that this was the first
9 time he had ever had an associate bring a HIPAA
10 complaint to him about another associate. He had never
11 dealt with this situation before. He had conducted
12 other investigations -- you heard him talk about Redbook
13 investigations -- and so he did what came naturally to
14 him is he started making some phone calls. And he did
15 those -- made those phone calls in -- as he said, using
16 broad, open-ended language so that he wouldn't actually
17 disclose HIPAA information in the context of looking
18 into this HIPAA issue.

19 Again, undisputed that he violated the HIPAA
20 policy. But is there any evidence in the record that he
21 held it against Ms. McPadden for raising the HIPAA
22 concerns? I submit to you there's none. There's no
23 such evidence. There's no negative comments in the
24 record, why are you raising this issue, nothing like
25 that. Nothing.

1 Another of Ms. McPadden's claims is that she
2 was retaliated against for complaining about safety
3 issues. What's the evidence of that? I guess what
4 you'll hear is that -- well, before I get to that,
5 there's no dispute that there were problems at Seabrook.
6 If you want to call them opportunities, great; you want
7 to call them problems, great. It was a tough place to
8 work because they were having staffing issues. They
9 were having staffing issues in 2012, they were having
10 staffing issues in 2011, and if you read some of the
11 e-mails from Ms. McPadden that are in evidence, they
12 were having staffing issues in 2010. At one point she
13 described the Seabrook pharmacy as a sinking ship, well
14 before Josh Varieur arrived, well before Mr. Certo
15 arrived. And Mr. Certo testified that he absolutely
16 viewed it as her responsibility to bring these issues to
17 his attention. It was part of her job. It was part of
18 her professional responsibility as a pharmacist in
19 New Hampshire.

20 So what's the evidence, ladies and gentlemen?
21 What's the evidence that Mr. Certo somehow wanted to
22 retaliate against Ms. McPadden because she raised these
23 issues? What's that evidence? I understand your
24 frustration? I understand your frustration? Is that
25 what we're going to hear, that when Mr. Certo responds

1 to Josh Varieur's e-mail on November 26th, in
2 Plaintiff's 47, I understand your frustration, they're
3 going to ask you to believe that this frustration is
4 frustration with Maureen McPadden complaining about
5 safety issues?

6 Read the e-mail, ladies and gentlemen. When
7 you have the opportunity in the jury deliberation room,
8 read the e-mail. He's talking about retraining the
9 staff, including Ms. McPadden, because they are both
10 jointly responsible for helping to fix the problems in
11 Seabrook. The problems that he was -- that he testified
12 about that he was trying to fix through his efforts,
13 they were responsible as well.

14 He was talking about 15-minute breaks. Not
15 bathroom breaks, ladies and gentlemen; not bathroom
16 breaks. You heard him testify to the fact that he was
17 talking about the 15-minute breaks and that it's
18 important when you're trying to organize work flow in
19 the pharmacy to have people take their breaks at
20 scheduled times so that people aren't taking a 15-minute
21 break whenever they want to, leaving some poor customer
22 at the pharmacy window waiting and unattended to.

23 There's no evidence in the record, ladies and
24 gentlemen, to suggest that this frustration -- and the
25 frustration is Josh Varieur's frustration. I understand

1 your frustration. He's not saying -- he doesn't say,
2 I'm frustrated. I understand your frustration.

3 And you heard Mr. Certo testify as to why he
4 understood the frustration, because he had dealt with
5 the exact same kinds of situations when he was a
6 pharmacy manager in Providence. He'd had to help train
7 technicians there and get that pharmacy back up on its
8 feet.

9 You'll also hear, as you heard during the
10 course of this case, some comments about shifting
11 decision-makers, shifting policy rationales. Well,
12 ladies and gentlemen, if you ask -- if lawyers ask you
13 the same question over and over and over in slightly
14 different ways, I'd submit to you that you're bound to
15 get some inconsistencies over time.

16 Think back to Ms. McPadden's own testimony.
17 At her deposition, she denied ever having received the
18 first coaching, the one that was originally designated
19 as a verbal coaching, and then when Walmart globally
20 sort of changed its policies it became a first written
21 coaching. At deposition she denied ever having received
22 it. Then at trial she admitted -- she said, oh, yup, I
23 admit it, I did receive that coaching.

24 When I asked her why -- this is a change,
25 right? She was sworn to tell the truth in her

1 deposition -- you learned a lot about depositions during
2 this case. She was sworn to tell the truth at her
3 deposition, she was sworn to tell the truth here, and
4 she changed her testimony when she came to this court.

5 And I asked her, well, you know -- well, in
6 the course of the questions, you know, why did you
7 change your testimony? And she said she was nervous
8 during the -- during the deposition that I took of her.

9 Okay. Well, she sat for one deposition and some of
10 these witnesses that you heard from sat through multiday
11 depositions, including what are called 30(b) (6)
12 depositions, where witness is supposed to synthesize all
13 the information available to Walmart and testify to it
14 in a coherent manner. Aren't they allowed to be a
15 little nervous, too? Is it not expected that they might
16 not remember things 100 percent, just like Ms. McPadden
17 didn't?

18 Ms. McPadden also couldn't recall whether she
19 had her keys on -- her pharmacy keys on Sunday or not,
20 right? She testified that she -- she thought she did,
21 she testified at deposition, as you heard, that she
22 couldn't recall whether she'd lost them over the weekend
23 on Saturday or Sunday. And don't we expect that? Don't
24 we expect that three years ago you might -- you might
25 not remember exactly what happened in exactly what in

1 what sequence three years ago?

2 Ms. McPadden had difficulty remembering
3 things. So did Heather Harris McCaffrey, so did Barbara
4 Kulwicki, and so did Joseph Certo. That's memory.
5 That's life. That's what happens when people are asked
6 to remember things that happened long ago.

7 With regard to the coaching, Ms. McPadden
8 testified that -- well, I remember it now, but I didn't
9 think it was coaching. Well, then I showed her the
10 e-mail where she complains to David Kelly. She says,
11 hey, I just received a coaching for these issues; and
12 there wasn't a spot for me on the form to explain why I
13 disagreed with the coaching or put it in context. And
14 she articulated that in this e-mail to David Kelly.

15 Now she said, I didn't think it was a coaching
16 at the time; I remember the conversation, I didn't think
17 it was a coaching. And then I showed her the e-mail and
18 she said, oh, yeah, yeah, I guess, yeah, it's a coaching
19 -- here I am, in writing, saying it's a coaching.

20 Am I saying she was lying or she was doing
21 anything inappropriate? No, ladies and gentlemen. It's
22 memory. Memory is a funny thing. Some people will
23 remember every single thing that happened, some people
24 will not, and when you try to have three people remember
25 under oath exactly what happened in exactly what

1 sequence in a conference call three years ago, there's
2 bound to be some discrepancies.

3 Going back to the conference call with Heather
4 Harris McCaffrey, Barbara Kulwicki, and Joe Certo,
5 Heather Harris McCaffrey testified that going into that
6 conference call she had already -- she had already had
7 in her head a second-level coaching before she even
8 spoke to Barbara Kulwicki because of the situation
9 involving the vision center employee, that she had been
10 told that a vision center employee had lost her key and
11 as a result received a skip-level coaching in the same
12 region and so she was thinking in her mind that this was
13 a precedent. You heard that testimony. Barb recalls --
14 Barbara Kulwicki recalls Ms. McCaffrey testifying or
15 talking about that vision center employee as well.

16 Now, you may, as you sit here, say to
17 yourself, well, I don't think that vision center person,
18 whoever she was, had -- you know, should have gotten a
19 second coaching; that's just not -- doesn't make sense
20 to me. I -- you look at that situation and you might
21 say to yourself, that's not how I would do it. Well,
22 ladies and gentlemen -- and you'll hear some
23 instructions on this from the Court -- that was
24 Walmart's business judgment at the time. Whoever made
25 the decision to issue that second-level coaching to that

1 vision center employee decided that a second-level
2 coaching was appropriate. Okay? And Heather Harris
3 McCaffrey is entitled to rely on that in making a
4 decision. And that was a decision that Joe Certo
5 apparently had never even known about. Okay? She
6 thought that given that that a second-level coaching was
7 appropriate.

8 Ladies and gentlemen, you have heard testimony
9 from a number of people about what was said and when it
10 was said. You've heard -- you've heard and seen
11 documents talking about different policies that were
12 identified at different times. And, ladies and
13 gentlemen, I guess what you're going to hear is that
14 this was all part of some sort of cover-up; that Walmart
15 kept changing its reasons as to, you know, who was
16 involved in the decision and what policy was relied upon
17 as some form of cover-up. Well, ladies and gentlemen,
18 if that was -- if that's the theory, if that's their
19 claim, they did a poor job of it because they left a
20 track record of exactly each step along the way, what
21 they said, and it's in writing. If there was some grand
22 master conspiracy going on here, why would -- and if you
23 believe, as I think you're going to hear argument, that
24 these individuals are willing to lie under oath for some
25 reason, if they're going to lie, why not all get

1 together in one room and agree upon a story? Why not
2 just come up with a story that is consistent throughout?
3 They didn't do that. There's no evidence that they did
4 that. Instead, they told the truth. And the truth is
5 messy because memories are fallible.

6 Now, you've heard some testimony about
7 interrogatory responses and you'll have the opportunity
8 to review those responses in full; the long, lengthy
9 questions, the legal objections, the factual responses.
10 The lawyers -- the lawyers' questions, the lawyers'
11 responses, the company's responses. And I'll submit to
12 you that the first set of interrogatory responses, the
13 commission -- the responses filed with the New Hampshire
14 Commission for Human Rights or submitted in the course
15 of the New Hampshire Human Rights Commission
16 proceedings, those are signed by Joe Certo and they
17 identify Joe Certo as the person who's -- who was
18 consulted regarding those interrogatories.

19 Specifically, when you look at Plaintiff's
20 Exhibit 10, interrogatory number 2, it says, Joe Certo
21 assisted in the preparation of these responses. He is
22 the person named in interrogatory number 2 as the person
23 who assisted in preparation of these responses. And
24 what does he say in these interrogatory responses?
25 Specifically, number 11, he says that Ms. McPadden's

1 employment was terminated after she admitted losing her
2 pharmacy keys while on a second written coaching,
3 exactly what you heard him testify to here under oath.

4 And the interrogatory responses number 14 --
5 well, 15, in response to interrogatory number 15, when
6 asked about what policies might have been implicated by
7 the loss of the pharmacy key, Mr. Certo identifies the
8 Key and Door Control policy, the very policy that he was
9 discussing via e-mail with his Division 1
10 colleagues in the e-mail exchanges during the morning of
11 November 26th.

12 And he, in interrogatory response number 14,
13 states that he and Heather Harris McCaffrey and Barbara
14 Kulwicki conferred and determined that Ms. McPadden
15 should be terminated after she admitted losing her
16 pharmacy keys while on a second written coaching.
17 Mr. Certo provided -- is the one who provided
18 information in connection with these interrogatory
19 responses and he provided information that's completely
20 consistent with how he testified here at trial regarding
21 his role in the events.

22 He absolutely was involved in the process. He
23 raised the issue to Heather Harris McCaffrey, is there
24 accountability. Ms. McCaffrey then takes it upon
25 herself to start a conference call with Barbara

1 Kulwicki. And Joe, in his memory, as he'd testified to
2 here, he's on the phone call. They're all conferring.
3 Heather Harris McCaffrey, Barbara Kulwicki, they don't
4 remember him, but these are -- you know, this is the
5 information that Joe has. He remembers being on that
6 call, he remembers being part of the process, if you
7 will, and he remembers Barb and Heather making the
8 decision.

9 And then what happens? Then this case moves
10 from the Human Rights Commission to the court. And,
11 once again, Maureen has attorneys serve interrogatories
12 on Walmart. And in these responses, which are
13 Plaintiff's Exhibit 11, a little different. Who
14 provides information in response to these
15 interrogatories? Take a look at response to
16 interrogatory number 1. Joseph Certo, Barbara Kulwicki,
17 Heather Harris McCaffrey are the individuals identified
18 as providing information responsive to these
19 interrogatories. The first set was Joe; the second set
20 was information provided by all three.

21 And now we have the same questions repeated
22 again, but this time they're trying to get -- they're
23 getting information, they're getting responses, from
24 three different individuals, three individuals who have
25 very different memories of what happened on that phone

1 call. How do you provide a response to a question when
2 it's posed to a company that's based on information from
3 three different people, each of whom have different
4 memories of what happened during a phone call? You
5 provide all the information.

6 So in response to interrogatory number 9, what
7 are the policies that -- that led to her termination?
8 What's identified? The Coaching for Improvement policy,
9 obviously; she was on second-level active coaching. A
10 skip level resulted in her termination. Two, the AP-05
11 Key and Door Controls policy, the very policy that
12 Mr. Certo had previously identified in the responses to
13 the New Hampshire Commission for Human Rights
14 interrogatories, the very policy that Mr. Certo
15 discussed via e-mail or received comments about by via
16 e-mail with his Division 1 colleagues on the morning of
17 the 26th, the very policy that is referenced in his
18 e-mail to Heather Harris McCaffrey. In that e-mail, in
19 the subject line, what does it say? Key control.
20 That's the policy that he had in his mind that morning,
21 because that's the policy that his colleagues had
22 mentioned.

23 What else is identified in interrogatory
24 response number 9? The HIPAA policy. Because that was
25 a policy that Ms. McPadden had made a complaint under

1 way back when, so it's obviously relevant to the case.

2 And then finally we have a reference to the
3 Pharmacy Operations Manual policies. And you heard
4 testimony here under oath from multiple witnesses that
5 the matrix that Heather Harris McCaffrey and Barbara
6 Kulwicki talked about during the conference call is a
7 part of the Pharmacy Operations Manual. The Pharmacy
8 Operations Manual includes the matrix. It also includes
9 POM 902, which is that sort of broader policy about
10 pharmacy security that you heard some testimony about as
11 well. That policy, that POM 902, is referenced in the
12 matrix. And, again, neither the matrix nor POM 902 nor
13 AP-05 specifically say that if you lose your pharmacy
14 key, you will get a skip-level coaching or even that you
15 will get a first-level coaching.

16 But I think if you look at those policies and
17 if you consider the testimony that you heard here about
18 the importance of maintaining pharmacy security, I think
19 the only conclusion that you can reach is the same
20 conclusion that Heather Harris McCaffrey and Barbara
21 Kulwicki reached: Pharmacy security is important; we
22 may not have an exact policy on point, but a pharmacy
23 key is part of that security system, if you will, and so
24 the loss of a key merits some significant discipline.

25 Now, in those same interrogatory responses,

1 interrogatory number 14 asks, again, who made the
2 decision to issue the skip-level coaching. And just
3 like in the prior interrogatory responses, Barbara
4 Kulwicki, Heather McCaffrey, this time it's they
5 determined that. Not conferred and determined, but
6 determined.

7 How do you synthesize three different memories
8 of what happened? How do you synthesize the fact that
9 Heather Harris McCaffrey and Barbara Kulwicki testified
10 and believed and remember that they're the ones who had
11 this back-and-forth, and they're the ones that made the
12 decision with the -- and the fact that they don't even
13 remember Joe Certo being on the phone call? How do you
14 sort of close that loop? You write that Barbara and
15 Heather determined. They're the two who made the
16 decision. It's not to say that Joe wasn't on this phone
17 call. He absolutely was. He testified to it. He
18 stated as much in the interrogatory responses. But it's
19 clear that the decision-makers on this call were
20 Ms. Kulwicki and Ms. McCaffrey, and not Mr. Certo.

21 These interrogatory responses, when you look
22 at them in context, when you consider the testimony that
23 you have heard, do not represent any sort of shifting of
24 who made the decision, what the decision was based on.
25 They're simply responses to convoluted questions that

1 were prepared as best as possible based on the memories
2 of three people who have different recollections of what
3 happened. If anything, they're evidence of poor
4 memories, not evidence of discrimination, not evidence
5 of retaliation, and they're certainly not evidence that
6 Joe Certo -- who's consistently admitted that he was on
7 that phone call when this decision was made -- certainly
8 not evidence that Mr. Certo harbored any kind of
9 discriminatory or retaliatory animus.

10 Ladies and gentlemen, Ms. McPadden received a
11 skip-level coaching because she lost her pharmacy key.
12 As I testified -- as I told you in my opening statement
13 and as you heard from Ms. McCaffrey and Ms. Kulwicki,
14 that loss was significant. No one had ever -- to their
15 knowledge, no one had ever lost a pharmacy key before
16 and it's important. You know its what's behind the
17 pharmacy counter. You know why it's important to keep
18 that secure. And they decided -- the evidence has shown
19 that they decided that Ms. McPadden's loss of her
20 pharmacy key warranted a skip-level coaching.

21 They didn't know it was going to be
22 termination. They testified they didn't think it was
23 on -- in and of itself that it warranted termination,
24 but that it warranted a skip-level coaching. This was
25 their testimony. That is what happened in the case.

1 They decided to hold Ms. McPadden accountable. Not
2 because of her gender -- Heather Harris McCaffrey and
3 Barbara Kulwicki did not coach Ms. McPadden because of
4 her gender. There's no evidence of that. There's no
5 evidence that she -- that they coached her because she
6 requested a leave of absence, there's no evidence that
7 they coached her for complaining about concerns of the
8 pharmacy. Indeed, there's no evidence that they were
9 even aware of those concerns. There's no evidence in
10 the record that they coached her for complaining about
11 HIPAA issues. None. The only thing that you've heard
12 is some conjecture and some speculation.

13 Ms. McPadden was a pharmacist and she lost her
14 key to the pharmacy. That's what the evidence has shown
15 in this case. That's what I told you at the outset of
16 this case the evidence would show.

17 Ladies and gentlemen, thank you very much for
18 your time this week. Thank you for your consideration
19 of the evidence. I believe that the evidence will show
20 once you've had a chance to deliberate that Walmart held
21 Ms. McPadden accountable because of her actions, not
22 because of any discriminatory or retaliatory reasons.

23 Thank you.

24 THE COURT: Thank you, Mr. Kaczmarek.

25 Ladies and gentlemen, just because the

1 argument was a little extended and I don't -- to be fair
2 to plaintiffs, maybe we should take a short break so
3 that we're all ready to go because I think plaintiff's
4 will be equally extended.

5 So we'll take just a brief recess.

6 (Recess.)

7 MS. IRWIN: Your Honor, we just have a very
8 quick issue. There were a couple of blow-up charts that
9 are not exhibits in the case that we wanted to use. And
10 Attorney Kaczmarek objects, so we hoped that we could
11 just --

12 MR. KACZMAREK: Yeah. And the primary reason
13 for my objection, your Honor, is that as you can see,
14 the charts contain, among other things, direct quotes
15 from deposition testimony; not the testimony that was
16 given in court, but deposition testimony. That
17 testimony is not in the record evidence in this case.

18 THE COURT: Oh, you can't use it to do that,
19 obviously.

20 MS. IRWIN: Okay. I mean, I -- to me, it's
21 just like making oral argument when Mr. Kaczmarek
22 referenced what Ms. McPadden had said in her deposition,
23 things that were brought up in court or in her
24 deposition --

25 THE COURT: Oh, if it's before the jury, you

1 can certainly point to it, but you can't now introduce a
2 quote from a deposition that has not been admitted in
3 into evidence in some way.

4 MS. IRWIN: Do you mean that the deposition
5 testimony was not spoken about in the trial?

6 THE COURT: Sure. All you can refer to --

7 MS. IRWIN: Yeah.

8 THE COURT: -- is what has been admitted --

9 MS. IRWIN: Right.

10 THE COURT: -- into evidence.

11 MS. IRWIN: Right. And so --

12 THE COURT: So extracurricular comments in a
13 deposition that were not admitted in evidence --

14 MS. IRWIN: Okay. But isn't it quite
15 similar -- and I -- I'm not going to die on this
16 mountain -- but when Attorney Kaczmarek said, oh, well,
17 Maureen, in her deposition, couldn't remember if it was
18 Saturday or Sunday, then she testified in court that she
19 thought it was Sunday --

20 THE COURT: But he covered that with her.

21 MS. IRWIN: Right. And all of these -- that's
22 I was just trying to clarify. All of the deposition
23 testimony that's in the charts was covered with
24 witnesses when they were on the witness stand.

25 THE COURT: Oh, okay.

1 MR. KACZMAREK: They're direct quotes, your
2 Honor, from deposition testimony, not --

3 THE COURT: Were those direct quotes given to
4 the witness and asked about?

5 MR. FRADETTE: Well, certainly the video
6 deposition --

7 MR. KACZMAREK: Well, but we're -- sorry.
8 I'm -- I'm up here. I haven't had a chance to review
9 all of this and that's certainly no fault of plaintiff's
10 counsel.

11 So we've got direct quotes from depositions
12 that were not presented into evidence; we've got
13 references to, among other things, you know, case --
14 Walmart transfer of the case to federal court. I don't
15 see -- that certainly didn't come into evidence. I
16 don't see how that's relevant and why the jury needs to
17 see it.

18 Certainly Attorney Irwin can reference
19 testimony, just like I did --

20 THE COURT: Sure.

21 MR. KACZMAREK: -- but to present direct
22 quotes from things that were not presented in evidence
23 in front of the jury I think is unfair, it's
24 prejudicial, and I just don't think it's appropriate.

25 THE COURT: Yeah, I think the operative

1 principle is you may, in your closing, refer to all of
2 the evidence that is properly before the jury.

3 MS. IRWIN: Yeah.

4 THE COURT: You may not introduce evidence to
5 the jury that was -- has not been properly admitted into
6 evidence.

7 MS. IRWIN: Right.

8 THE COURT: That answers the question.

9 Now, if you're asking me what was and what
10 wasn't, I don't -- I don't have a clue.

11 MR. KACZMAREK: Therefore, I would ask --
12 again, these were just presented this morning.

13 As I sit here, I don't know exactly what was
14 and wasn't, but it sure seems like a lot of it was not
15 covered. And, therefore, I'd ask the Court that these
16 blow-ups be -- be stricken, that they not be allowed to
17 be used or referenced during Attorney Irwin's closing.

18 THE COURT: Well, sure. I'll give you an
19 equally unhelpful general order. You may not refer to
20 evidence that was not admitted before the jury.

21 Now the ball's in your court.

22 MS. IRWIN: I'm not going to risk it. I'm
23 going to talk about my memory and we're all set.

24 MR. KACZMAREK: Thank you, Your Honor.

25 THE COURT: You can certainly use them, you

1 know, for your own reference if you want to turn it
2 over --

3 MS. IRWIN: I'll just --

4 THE COURT: Oh, you've got them. But, again,
5 you're not going to quote from a deposition --
6 deposition testimony.

7 MS. IRWIN: I'm going to do it the way
8 Mr. Kaczmarek did; he said this in his deposition, as
9 you heard in the court --

10 THE COURT: Okay.

11 (IN OPEN COURT - JURY PRESENT)

12 THE COURT: Attorney Irwin, whenever you're
13 ready.

14 MS. IRWIN: Thank you, your Honor.

15 CLOSING ARGUMENT BY ATTORNEY IRWIN

16 MS. IRWIN: Ladies and gentlemen of the jury,
17 Maureen McPadden, Attorney Fradette, and I thank you for
18 your attention to this case. I want to warn you I may
19 take an hour and possibly a little bit more, but Maureen
20 McPadden has waited several years to have her case heard
21 and I want to make sure I do her case justice.

22 So I want to start out with why does the law
23 protect the activities of raising safety and other legal
24 concerns? And the reason is that reporting these issues
25 is good for the public. We want someone to stop Walmart

1 when its practices are unsafe, someone like a pharmacist
2 who can tell that the practices are unsafe. We want
3 someone to raise an issue when patients' privacy is
4 being violated. We also think it's good for the public
5 to take limited leaves of absence to address medical
6 reasons. In Maureen's case, she took a leave of absence
7 to make sure that she could be safe to fill
8 prescriptions.

9 But if we all agree that this is important
10 activity, why would employees need legal protection when
11 they do it? Well, the truth is that hearing someone
12 blow a whistle about your failures is unpleasant and
13 frustrating. Imagine someone standing near you and
14 blowing a whistle to tell you that you're doing
15 something wrong, repeatedly, again and again. That's
16 unpleasant. And that would naturally lead someone to
17 want the person blowing the whistle to go away. This is
18 especially true for a new manager who would feel more
19 threatened by criticism.

20 Mr. Certo was a brand-new market manager and
21 he had just hired a brand-new pharmacy manager, Josh
22 Varieur. That was Mr. Certo's hire who clearly was not
23 up to the job. Maureen's concerns and her raising those
24 concerns very likely made Mr. Certo feel defensive since
25 it was -- he was new, it was his decision to put Josh

1 Varieur in the position, and the pharmacy was clearly
2 operating under unsafe conditions. Now add on that Mr.
3 Certo was covering two markets as a brand-new market
4 manager in the fall of 2012. He's busy. And as
5 Attorney Kaczmarek said, he's stretched thin. He
6 doesn't want to hear someone raising safety and legal
7 concerns.

8 The same is true with the FMLA leave. A leave
9 of absence, particularly unplanned, is, in fact,
10 inconvenient, especially for a new market manager like
11 Joe Certo who was facing staffing issues already. Even
12 Mr. Certo had to agree that an unplanned leave of
13 absence creates a challenge for management.

14 So the law protects employees like Maureen
15 from being fired for doing the right thing. The law
16 doesn't stop a manager from feeling the frustration; the
17 law stops the employer from acting on it by taking
18 adverse action against the employee.

19 Now, Walmart has stipulated, which means that
20 Walmart agrees, that Maureen had a reasonable and good
21 faith basis to raise safety concerns, to raise her HIPAA
22 concern, and also that she engaged in protected activity
23 under the FMLA. So you do not need to decide those
24 issues because there's no dispute on those issues.

25 The evidence in this case demonstrates that

1 when Maureen raised those reasonable and good
2 faith beliefs about the unsafe conditions, including
3 Josh Varieur's synthroid error and the other conditions
4 at the pharmacy, the HIPAA violation, and when she took
5 and discussed her need for FMLA leave, Joe Certo
6 eventually got frustrated and he used that frustration
7 to seize on the loss of the key as an excuse to fire
8 Maureen. And he influenced the decision so that he
9 could get her fired. That was the real reason.

10 Now, I am not the first person to come up with
11 an idea of what type of evidence can be used in an
12 employment discrimination case. There's a body of law
13 that has been developed on this and Judge McAuliffe is
14 going to tell you what that law is. And so one of the
15 ways that you can prove discrimination or retaliation is
16 through circumstantial evidence. And the shifting or
17 consistent reasons and the timing, those are all ways
18 that the law has found legitimate, perfectly good ways
19 to prove these cases. That's not my idea. That's what
20 the law says. And so I would just ask you to please
21 pay -- listen to the judge on those instructions and I
22 will try to summarize the evidence in a way that's
23 consistent with that law.

24 The evidence in this case demonstrates that
25 when Maureen raised her good faith beliefs, he got

1 frustrated and he seized on the key as an excuse. And
2 Walmart is defending the case by essentially saying Joe
3 Certo and Walmart may have not been the best, but they
4 did the best they could, they don't have really good
5 memories, and they didn't discriminate or retaliate.
6 But, ladies and gentlemen of the jury, Mr. Certo is not
7 stupid. He went from being a pharmacist to a pharmacy
8 manager to a market manager to now a regional manager in
9 less than five years. He knows what to do and he knows
10 what he wants.

11 Judge McAuliffe will instruct you that Maureen
12 McPadden does not need direct evidence of Walmart's
13 unlawful motive. A company and a person like Mr. Certo
14 or Ms. McCaffrey or Ms. Kulwicki, for that matter, will
15 never -- in my experience, will never admit that they
16 violated the law. That's why you are allowed to look at
17 circumstantial evidence and you can rely exclusively on
18 circumstantial evidence. There are several types that
19 you may consider in the case.

20 The first type is called temporal proximity,
21 which is the timing. And the reason for that is when
22 you see a lot of protected activity happening close in
23 time to when the termination happens, that's evidence
24 that the decision was motivated by the unlawful reasons.
25 So let's look at the timing.

1 Maureen reported the dispensing error, which
2 was a patient safety issue, on August 13th, 2012.
3 Maureen then e-mailed Mr. Certo about safety concerns on
4 August 29th, 2012. And let's imagine each one of these
5 things is a blowing of a whistle.

6 Maureen took FMLA leave from November 19th
7 (sic) through October 3rd and when she returned, she
8 alerted Mr. Certo that she wanted a meeting to discuss
9 the HIPAA violation. That one-hour meeting took place
10 in mid to late October. During that meeting, she
11 reported the HIPAA violation, the FMLA leave that she'd
12 taken and she'd likely need more, and she reiterated her
13 safety concerns. Maureen e-mailed Mr. Certo with her
14 serious safety concerns again on November 16th, 2012.

15 By November 26th, 2012, Maureen had -- was
16 again raising concerns that the technicians were not
17 being given bathroom breaks. And you'll be looking at
18 Exhibit 47. It is very clear that Mr. Varieur is saying
19 that Maureen is resisting him. And when Mr. Certo says
20 he understands the frustration, the e-mail is about
21 Maureen not stopping the technicians from taking breaks
22 when it was outside of their scheduled 15-minute break.

23 So, again, Maureen is standing up for the --
24 for someone, raising a concern, and by this point -- and
25 obviously these things can build -- by this point,

1 Mr. Varieur is describing Maureen's reporting as
2 resistance and Mr. Certo, most importantly, is saying, I
3 understand your frustration.

4 That very same day, Mr. Certo is involved in
5 the decision to issue the second-level coaching to
6 terminate Maureen. Well, the defense questioned why not
7 earlier. First of all, these issues do build. There's
8 a new manager, she's repeatedly raising concerns and
9 raising concerns from the very end of August until
10 November. It's not a very long time period and there
11 are quite a few concerns raised. So certainly it would
12 be -- his frustration would naturally be building.

13 Secondly, as I discussed earlier, Mr. Certo is
14 not stupid. Ms. McPadden had raised her concerns in
15 writing, said that she was documenting. He would know
16 that human resources had a record of her FMLA leave. If
17 he's going to do something to her, he's going to do it
18 carefully. He's risen amazingly fast at Walmart. He
19 knows what he's doing. He was going to do it carefully
20 and he was going to do it with cover from his peers and
21 from his manager. So there's compelling evidence based
22 on the timing alone.

23 The second type of circumstantial evidence
24 you may consider is called pretext. Pretext means false
25 or -- or although true, not the real reason for the

1 action taken. A pretext is an excuse to hide the
2 unlawful reason. One way to show pretext, which the
3 judge will tell you is the law, is to show that
4 Walmart's explanation for issuing the second-level
5 coaching to Maureen is weak, inconsistent, and/or has
6 contradictions in it. That's not a theory that I'm
7 raising for the first time in history. That's what the
8 law says about this and so you are allowed to consider
9 that evidence.

10 There's no dispute that Maureen lost her key
11 and immediately and properly reported the loss. There's
12 no dispute on that. And we agree that Walmart does not
13 need a policy to terminate an at-will employee. We
14 agree with that. But there is compelling evidence of
15 Walmart's shifting, weak, and contradictory
16 explanations.

17 Now, Mr. Certo, being a witness at the Human
18 Rights Commission, didn't say, hey, you know, she lost
19 the key, we consider that important, that's why she got
20 a second level. He actually -- he could have said, we
21 don't have a policy that covers this, but we wanted to
22 do this. But that's not what he did. He -- he said it
23 was the AP-05 policy. And he actually said, I believe
24 in court and also at his deposition, that it was that
25 AP-05 policy that was discussed with Ms. McCaffrey and

1 Ms. Kulwicki. Well, Walmart didn't like that policy
2 because it's not a policy -- when you look at it, it
3 doesn't justify any discipline for losing a key and
4 properly reporting it.

5 So Walmart changed it to POM 902, which, by
6 the way, POM stands for Pharmacy Operation Manual. So
7 that's what a POM is. So they changed to 902 and then
8 eventually up pops this idea of a matrix, which does not
9 have a POM at the top of it. It's a matrix. And
10 Ms. Kulwicki loved to talk about the matrix because she
11 believed that allowed her to say she didn't have to
12 consider any other comparators, whether anyone had ever
13 lost a key in the history of Walmart before, because the
14 matrix made it a whole new world, so she didn't have to
15 do her job of assuring that there was consistency to
16 avoid violations of the law.

17 Now, you can see that when you look at the
18 interrogatory answers and the other exhibits that you
19 have, the matrix was never mentioned in written
20 statements under oath at all. So they tried to use a
21 policy to justify a termination. When it didn't work,
22 they testified under oath that they were really using a
23 different policy.

24 Now, I'll just respond to one issue Attorney
25 Kaczmarek raised. If they wanted to say that different

1 people had different memories, they certainly could have
2 done that. You'll see in some of the sworn testimony
3 they actually say, Mr. Certo recalls. They could have
4 said Mr. Certo recalls this, Ms. Kulwicki recalls that,
5 Ms. McCaffrey recalls the other thing. That's not what
6 they said. They gave an official answer of what was
7 Walmart's answer and they had their people sign it under
8 oath.

9 And so they switch around which policy, none
10 of the policies actually tell you that anybody would be
11 disciplined or how much the discipline would be for
12 losing a key. And, of course, the problem with being
13 dishonest is that it's hard to keep your story straight.
14 And in the end, Mr. Certo and Ms. McCaffrey and
15 Ms. Kulwicki, among themselves, could not decide which
16 policy they were using to justify the discipline, which
17 policy they had discussed when they were deciding on the
18 discipline. And remember Ms. Kulwicki finally had to
19 admit that no policy actually justified the discipline,
20 so she went back to saying, we don't need a policy.

21 Now, Walmart doesn't need a policy, but they
22 spent a lot of time being dishonest about it to try to
23 cover themselves. And shifting around and being
24 inconsistent is evidence that they were trying to cover
25 up the discriminatory and retaliatory reasons for the

1 termination.

2 And, finally, I would remind you that Andy
3 Tau, in his short video deposition, testified that he
4 was told that he was disciplined for losing his key
5 because it cost Walmart money to change the locks.

6 Now, on the issue -- another inconsistency is
7 on the issue of who decided to issue the second-level
8 coaching. Again, shifting inconsistent reasons. First,
9 Mr. Certo clearly stated at the Human Rights Commission
10 that he was one of the three who conferred and
11 determined and that he was one of the three who was
12 ultimately responsible for the decision to terminate.
13 And that's in Exhibit 10, number 18. So it wasn't a
14 tricky question. It was who was responsible for making
15 that termination decision, and he listed that he was one
16 of the three.

17 Then Walmart decided since Mr. Certo knew all
18 about Maureen's protected activity and Ms. McCaffrey and
19 Kulwicki maybe did not, it would be bad for Walmart if
20 Mr. Certo was a decision-maker. So what did they do?
21 They rewrote history and said only McCaffrey and
22 Kulwicki decided. That's Exhibit 11. It really
23 couldn't be stated more clearly. It's not a tricky
24 question. They said they decided it and then they said
25 Mr. Certo only executed the decision. Big change. Not

1 by accident.

2 And as I said before, the problem with being
3 dishonest is it is hard to keep the story straight. And
4 when he's on the stand, Mr. Certo eventually went back
5 to saying he was a decision-maker and then he wasn't
6 sure if he was a decision-maker and then he was a
7 decision-maker and then Ms. Kulwicki really couldn't
8 decide if she was a decision-maker or not, even though
9 she had done a sworn statement under oath in written
10 documents that Walmart submitted.

11 And, eventually, Ms. McCaffrey testified
12 that -- finally testified -- that Mr. Certo had clearly
13 influenced her decision. And one of the things that I
14 find striking about the differences in the way we
15 describe the case in closing, which obviously is not
16 evidence, but there's one key conversation that
17 Attorney Kaczmarek did not discuss. And that was the
18 conversation after Mr. Certo sent his nice, innocent
19 e-mail, is there accountability for a lost key, question
20 mark, there was a call. Ms. McCaffrey said, I didn't
21 e-mail him back, I called him. And this was before the
22 conference call. She's got to get the scoop for what
23 are we going to be talking about, what are we going to
24 be doing here. That wasn't mentioned at all.

25 Well, that was a pretty big part of

1 Ms. McCaffrey's testimony and, by the way, she was the
2 most adamant and unshakeable witness, in my opinion,
3 that Walmart had. So there's the call.

4 And during that call, Ms. McCaffrey says
5 Mr. Certo influenced her decision because he told her
6 that Ms. McPadden did not take it seriously. And that's
7 why she went into the conference call with the idea that
8 she thought second level was -- was a good idea. And,
9 remember, she said there are only two reasons that she
10 thought second level was appropriate, not that she
11 thought termination was okay to go ahead the next day.
12 She said there were two reasons for second level. One,
13 losing a key is bad; and, number two, Mr. Certo told her
14 Maureen did not take it seriously. And that was before
15 the conference call.

16 And, by the way, one could certainly -- if we
17 want to try to synthesize information, one could
18 certainly imagine when Mr. Certo called Ms. McCaffrey
19 back the next day to finally tell her that it actually
20 was going to be a termination, he very likely would have
21 reiterated again that he didn't think that Maureen took
22 it seriously. So is it possible he said it twice?
23 Absolutely. But we know he said it on that -- on
24 November 26th to Ms. McCaffrey. She's not -- got no
25 reason to make that up.

1 Judge McAuliffe will instruct you that Walmart
2 can be liable for discrimination and retaliation if
3 Mr. Certo had a discriminatory or retaliatory motive and
4 influenced a neutral decision-maker like Ms. McCaffrey
5 or Ms. Kulwicki. So even if they didn't know about the
6 protected activity, if Mr. Certo did his work to
7 influence the decision -- which clearly he did,
8 Ms. McCaffrey said his input was one of the two reasons
9 that she gave a second level -- then Walmart is
10 responsible.

11 And I would -- finally, on the
12 inconsistencies, a final issue is even what reason they
13 state for the second-level coaching. They actually
14 don't list in any of their sworn answers that one of the
15 reasons was that Mr. Certo told Ms. McPadden that
16 Maureen didn't take it seriously. They just say it's
17 the loss of the key is the loss of the key is the loss
18 of the key. It's only when Ms. McCaffrey slips up or
19 discloses that information we see that in deposition
20 testimony. It's not in their sworn answers.

21 Now, remember Mr. Certo clearly testified he
22 had absolutely no basis to suggest that Maureen didn't
23 take the loss seriously and, in particular, when he
24 first spoke to Ms. McCaffrey, all he had were e-mails
25 from Maureen where she said, I've lost my key, I've

1 notified the store manager, a locksmith's on the way.

2 And certainly, perhaps, Mr. Certo knew that he
3 had no basis for that. He had told Ms. McCaffrey this.
4 And when he went to seal the deal on November 27th, he
5 wanted to have it -- in case she asked, what's your
6 basis for seriousness. He had called Maureen, he had
7 told her to look for a key that didn't work anymore. We
8 all know she looked very hard for the key. But he says,
9 somehow, that she didn't -- indicated in some way that
10 she didn't take it seriously. Perhaps she may have said
11 to him that we all understand I've gotten the pharmacy
12 rekeyed, just to make sure -- you know, which was a
13 fact. But

14 every -- there is no dispute that she took it very
15 seriously and she turned her house upside down.

16 So why was Mr. Certo dishonest about Maureen
17 when he spoke to Ms. McCaffrey? Mr. Certo was tired of
18 Maureen's complaints, he was tired of the time it was
19 costing him to deal with her concerns and her FMLA
20 leave, and he jumps on this issue like nothing we have
21 seen in this case. He's involved in a flurry of
22 e-mails. So how is he going to -- how is he going to
23 get this done?

24 Well, we know through e-mails that he
25 originally thought she was already on a third level. So

1 he just needs a first level. But he knows she's put
2 some concerns in writing recently. He knows her FMLA
3 leave is up with HR. So he's going to get some cover.
4 He thinks he only needs first level. He goes to his
5 peers. He -- he gets a first level.

6 And we know, and I believe Attorney Kaczmarek
7 admitted very likely, and certainly according to
8 Mr. Kelly, absolutely company practice. He actually
9 looks it up. He's into this issue. There were tons of
10 e-mails on this issue. During that time, he looked up
11 what her status was. He said to Mr. Wallis, I'll -- I
12 think she's on third level. I'll get back to you. He
13 looked up her status and he saw he needed second level.
14 But now he's agreed to first level. He's got to do
15 something to get up to second level. And that's why
16 he's dishonest about Maureen not taking the issue
17 seriously.

18 Now, Mr. Certo told a rather tortured story
19 about asking Maureen to look for the key that no longer
20 worked because he was feeling badly for Maureen and
21 thinking that the second level was too harsh. Well,
22 this story doesn't work for two reasons. One,
23 Mr. Certo's e-mail, which is Exhibit 57, shows that he
24 thought Maureen was on a third level at 11:53 in the
25 morning. Okay? If he thought -- and he testified he

1 thought she was on a third level all day long. It
2 wasn't till the next day that he realized that she was
3 only on second. So, you know, he had nothing to do with
4 this problem.

5 But he -- his e-mail shows he thought she was
6 on third level on the 26th. So if he thought she was on
7 third level, he wouldn't care whether she got one more
8 level or two more levels because even one more level
9 would have gotten her fired. If she's already on third,
10 which is what he says he thought, all he needs is a one
11 level. So why is he feeling badly that the coaching is
12 too harsh? It doesn't make any sense at all based on
13 his own e-mails that he thought she was already on a
14 third level.

15 Second, if Mr. Certo was actually sympathetic
16 to Maureen and trying to save her job, as he wants you
17 to believe, why would he fail to advocate for her for a
18 lesser discipline and why instead would he tell his
19 manager something negative about her, that -- give an
20 opinion, an unsupported opinion, that she didn't take it
21 seriously. His story makes no sense because it's a
22 cover-up for what he really did, which was he got
23 Maureen fired. He got the job done.

24 Walmart was also inconsistent with its
25 standard practice -- deviated or was inconsistent from

1 its standard practice when it came to Maureen. That's
2 additional evidence of pretext. You heard Mr. Kelly
3 testify this morning that the custom and practice was
4 for a market manager to accurately lay all the facts on
5 the table and advocate for the discipline that he
6 wanted.

7 And, actually, Rick, if you could just pull up
8 82, I'm going to go low-tech and just show you one of
9 the exhibits on a blowup.

10 So you heard Mr. Kelly testify this morning
11 that it would be standard practice for the market
12 manager to advocate for what he or she wanted as a
13 discipline. And that's exactly what we see here. This
14 is a different market manager, not Mr. Certo, and what
15 does this market manager do? First of all, she puts
16 right on the table that she checked with the peers and
17 that they thought it should be first level and that she
18 agreed, I would totally agree this would be next level
19 of coaching. Right? She -- she says that this
20 pharmacist informed them as soon as possible and that
21 she really thought that first level was appropriate.
22 That's the custom and practice of Walmart, to advocate
23 for what you want. But what do we see here? We have
24 evidence that Mr. Certo advocated for a second level by
25 saying Maureen didn't take it seriously, but Mr. Certo

1 tries to say, I didn't do anything; I -- I didn't
2 advocate one way or the other; I thought this was too
3 harsh, but I didn't say anything because, you know, that
4 was my boss. That's just not credible.

5 And this is extremely strong evidence that
6 Mr. Certo wanted Maureen fired. He did not give
7 Ms. McCaffrey the full facts. He didn't talk about what
8 the peers had recommended, that he had agreed, he claims
9 he didn't talk about the protected activity, and he
10 didn't advocate in her favor. Instead, he falsely
11 suggested that she didn't take it seriously. This is
12 just the type of circumstantial evidence that allows you
13 to conclude that Maureen was fired for unlawful reasons
14 even though Walmart won't admit it.

15 In addition to that pretext evidence that I've
16 just spoken about, we also have some key additional
17 pieces of evidence. You heard Mr. Certo admit in court
18 that he viewed Maureen's raising of complaints as
19 aggressive. Remember when they were trying to have him
20 agree that Mr. Varieur had raised a concern before, too,
21 and Mr. Certo said, well, that was different, and
22 Maureen's was aggressive? Maureen testified -- so we
23 know that Mr. Certo saw Maureen as different and he saw
24 her concerns as aggressive, which obviously is a
25 negative word which would be -- which would lead someone

1 to view her negatively.

2 We also had Maureen testify very credibly that
3 by the time of her termination, Mr. Certo was indicating
4 in his way of speaking to her, his lack of interest in
5 issues, and his body language that he was all done with
6 her.

7 We also know that Mr. Certo was trained on
8 HIPAA. He'd been a pharmacy manager for two years
9 before he was a market manager. He knew all about HIPAA
10 issues. And yet he did nothing to investigate Maureen's
11 serious HIPAA violation. And then he was dishonest
12 about it in court, trying to claim that he had done some
13 sort of informal investigation that involved asking the
14 store manager how things were going at the pharmacy.
15 Does that make sense?

16 Not to mention that even if we were to somehow
17 think that made sense, that he didn't know what he was
18 doing because he was brand-new, he'd -- he escalated --
19 he testified that he went to regional because he was new
20 and he had questions. He didn't go to regional and ask
21 questions about this. He just didn't investigate it.
22 He decided to wing it on his own. The truth is he did
23 nothing on that. Both Deb Genna and even Josh Varieur
24 testified that he absolutely never spoke to them about
25 this serious HIPAA issue.

1 Finally, as we've talked about the
2 November 26th e-mail, about Maureen raising concerns,
3 demonstrates that Mr. Certo was frustrated. And I'm not
4 sure if you caught it, but Mr. Certo tried to say that
5 he was being supportive of Maureen in that e-mail. If
6 you read that e-mail, Mr. Certo was clearly not being
7 supportive of Maureen. He was saying she needs to be
8 retrained so that she can stop technicians from taking
9 breaks when they want to. That's what the e-mail said.
10 And that's what he meant. And for him to try to say
11 that that meant he was supportive calls his credibility
12 into question yet again.

13 Now, the gender discrimination claim is a bit
14 separate because Maureen was not complaining about
15 gender discrimination while she worked for Walmart. She
16 didn't know that it had happened and she had been
17 treated differently until she was fired, but the
18 evidence on that remains clear as well. And I would
19 also say to you the reason that Mr. Certo is the
20 important actor for the retaliation claims is because
21 he's the one who knew of the protected activity, but for
22 gender, Walmart is not allowed to discipline women more
23 harshly than men for the same conduct. That's Walmart.
24 It doesn't have to be just Certo. It's Walmart as a
25 whole.

1 But first we see Mr. Certo's preferential
2 treatment of Mr. Varieur demonstrates gender
3 discrimination. Mr. Certo didn't bother to discipline
4 Mr. Varieur for log copies or even when Mr. Varieur
5 failed to submit a report for a serious dispensing error
6 and even when Mr. Certo saw on an e-mail from
7 Mr. Varieur that it had involved an intentional
8 switching of generic -- brand-name to generic because of
9 insurance, which is absolutely not allowed.

10 But Mr. Certo didn't discipline Mr. Varieur at
11 all. When Maureen raised concerns, Mr. Certo saw it as
12 aggressive and when Mr. Varieur talked about errors,
13 Mr. Certo complimented Mr. Varieur on his great detail
14 into his business. That's classic gender
15 discrimination.

16 And, finally, we have Andy Tau, which we have
17 this exhibit up here. Now, Mr. Certo wasn't involved in
18 disciplining Mr. Tau more leniently. He was involved in
19 getting Maureen disciplined more harshly. But everyone
20 knew of Maureen's gender, including Barbara Kulwicki.
21 The evidence could not be clearer. Maureen, who is
22 female, got a harsher discipline than Andy, who is male,
23 about a year apart.

24 Ms. Kulwicki tried to avoid responsibility for
25 her role in approving that lesser discipline for the

1 very same conduct. She first tried to say that she was
2 only asked about it after the fact and if she'd been
3 asked about it before, she would have said second level.
4 But then Walmart turned over this e-mail just a couple
5 weeks before trial and we can tell that that was not
6 true. Ms. Kulwicki was notified before the discipline
7 was imposed, before the decision was made. So then
8 she's consulted about it, so then what does she do? She
9 says, well, after this there was there was a phone call,
10 because I hadn't remembered Maureen -- this is the
11 person who said she never remembered a pharmacist ever
12 losing her pharmacy key before and Maureen was the first
13 one. But even a year later, less than a year later,
14 she'd completely forgotten about Maureen losing her key.
15 That's what she said.

16 So when she's reminded about Maureen in the
17 phone call, she says, oh, well, I think it had already
18 been done, so I really didn't want to go back and change
19 that.

20 And then I had to show her exhibit -- I
21 believe it's Exhibit 3, which showed that actually
22 Mr. Tau was not disciplined for several more days, not
23 till December 19th. So even though she got this e-mail
24 on a Sunday and she was, you know, all confused because
25 it was a Sunday and she couldn't be at work and figure

1 it out, by the time he was disciplined, she'd had
2 several days and she'd been reminded, because she needed
3 reminding about Maureen's second-level discipline.

4 So she had all the information in front of
5 her. She didn't look -- she says she didn't look at her
6 matrix where she'd written second level right on it
7 after she had agreed to the discipline for Maureen and
8 she allowed a male pharmacist to get a lesser discipline
9 for the same conduct.

10 And then, finally, she tried to distinguish
11 Mr. Tau by talking something about a crazy snowstorm
12 excuse. Certainly this e-mail tells her the store had
13 not been rekeyed yet for Mr. Tau. If he lost his key in
14 the Walmart parking lot in the snow and the key still
15 worked, how does that justify a lesser discipline? It
16 makes absolutely no sense and there is no snowstorm
17 defense to gender discrimination.

18 Ms. Kulwicki tried to suggest that she doesn't
19 have to abide by the law because she's responsible for a
20 thousand stores. Well, it's Walmart's choice to not put
21 enough people in the human resources department and they
22 need enough people to make sure that they abide by the
23 law. Ms. Kulwicki did not do her job to ensure that
24 Walmart followed the law.

25 Mr. Certo was Walmart's 30(b)(6) company

1 representative on this issue and he also agreed that
2 while second-level discipline was appropriate for
3 Maureen, first level was appropriate for Andy Tau. And
4 Mr. Certo told you the reason was that Mr. Tau's key was
5 in the possession of the parking lot. It makes no sense
6 and is evidence of gender discrimination.

7 I would submit to you that it all comes down
8 to who's credible and who has demonstrated integrity in
9 the case. Maureen has integrity and credibility. She's
10 worked as a capable pharmacist for Walmart for 13 years.
11 Maureen had previously reported concerns to different
12 supervisors and those supervisors had worked to fix
13 things. They did not retaliate. But then Joe Certo and
14 Josh Varieur came on board and conditions got worse.
15 Maureen had called the central office in Arkansas before
16 when she had concerns and she'd been directed back to
17 work with her market manager. She viewed that as using
18 the open door policy and she followed directions on that
19 issue.

20 Finally, there's no dispute Maureen properly
21 reported the key loss and she spent a lot of the night
22 trying to find that key. Maureen has integrity and she
23 did the right thing and her testimony was credible.

24 Maureen even spoke to you about performance
25 evaluations, even though performance evaluations are not

1 a reason for termination in this case. She wanted you
2 to have the full story. And she has to rely on the
3 documents that Walmart produced in the case. And she
4 talked about the fact that she had very good, she had
5 some medium, she had some issues that she could work on.
6 She wanted you to have the full story. And obviously
7 that's not the reason for her termination, but she
8 wanted to be complete.

9 Now, on the issue of the coaching, the first
10 time -- you heard Maureen tell you the first time that
11 she saw what Walmart has submitted as the coaching
12 documents in this case, the previous coachings, was at
13 her deposition. She thought she had had a verbal
14 coaching with no document from her manager in 2011. So
15 she would understandably be surprised to see something
16 called a First Written Coaching. It doesn't have her
17 signature on it, had never seen it before, and the date
18 tells you that it was changed after the coaching -- the
19 verbal was given to her. It makes sense that she would
20 have been surprised and not understand why -- what that
21 coaching was called. She did not dispute that
22 Ms. Urbanski had spoken to her verbally about getting
23 caught up on log copies. That was never disputed
24 anywhere.

25 And then the second-level coaching, same

1 thing. She had thought it was a first level, because
2 that's what she was told at the time. They changed it
3 after the fact. As soon as everybody got clear that
4 Walmart had changed their documentation, she readily
5 admitted to you she was on a second level in November of
6 2012. There's no dispute about that and Maureen didn't
7 try to dispute it. There's no loss of memory. It was a
8 change in the documents.

9 And Maureen didn't exaggerate. She didn't say
10 that Mr. Certo said, I'm going to get you. She told you
11 the truth. She told you how his lack of response and
12 his demeanor, especially at the one-hour meeting and
13 after, demonstrated that, to her, she felt that he was
14 all done with her. She told you how his having her look
15 for a key that no longer worked demonstrated to her that
16 he was going to use this key issue as an excuse to get
17 her fired. She told you the truth.

18 Walmart does not have credibility. Joe Certo
19 is handling so many pharmacies that he just couldn't be
20 bothered to get to the bottom of really much of anything
21 during that fall. Not serious safety concerns, not
22 dispensing errors, nothing. He never escalates anything
23 of these concerns or these errors up to his regional
24 until he's got an issue with Maureen's key that he wants
25 to use and he knows that she's been recently raising

1 concerns.

2 After months of inaction, he is a tornado of
3 activity as soon as he finds an excuse to get rid of
4 Maureen. Look at how quickly that happened. It was
5 within a matter of hours. Multiple e-mails, he's
6 e-mailing, he's meeting, he's talking on the phone with
7 Ms. McCaffery, he's joining on the conference call.
8 He's got her fired within three hours of her reporting
9 that the key is lost.

10 As to the timing of those e-mails, we know
11 that some of Mr. Certo's e-mails were one hour off.
12 They may have been central time instead of eastern
13 standard. I would represent to you that when you look
14 at Exhibit 57, it appears that when the e-mails say "On
15 behalf of Joe Certo," they're eastern standard time and
16 when they just say "Joe Certo," they're central time,
17 which is one hour earlier.

18 And Joe Certo actually admitted in court that
19 he may have contacted Ms. McCaffrey after he had agreed
20 to a first -- that a first level was appropriate and
21 Mr. Kaczmarek just pointed out a few minutes ago a point
22 that I was going to make, which is the title of the
23 e-mails changes from Lost Key to Key Control after
24 Mr. Wallis brings up the key control policy. So it
25 makes sense that Mr. Certo is talking about key control

1 after the two-minute exchange he has with Mr. Wallis
2 where he agrees that first level is appropriate.

3 The reason that that's important is that it
4 shows that after Joe agrees that first level's
5 appropriate, which at the time he thinks will get
6 Maureen fired, he looks up her discipline and he knows
7 he needs second level and that's when he speaks with
8 Ms. McCaffrey and says that Maureen did not take it
9 seriously.

10 He also in the conference call didn't tell
11 them that he discussed it with his peers and he'd agreed
12 that first level was appropriate. He doesn't say a word
13 about that like the other market managers do.

14 He also doesn't tell them about the example
15 that he was given of someone being disciplined for
16 failing to report the loss of a key. And, of course, he
17 most likely doesn't tell them that he's frustrated about
18 Maureen's reports of concerns and her need for medical
19 leave when they're short-staffed. He does more than not
20 provide full information. He provides false information
21 about Maureen's lack of seriousness.

22 Now, we believe the evidence will show that
23 Mr. Certo knew that Maureen was going to be fired by
24 November 26th, by the afternoon, when he tells his
25 peers, it's going to be second level, and he's going to

1 partner with Mr. Hamilton. In fact, again, it was
2 Ms. McCaffrey who was extremely solid on that point.
3 She said, you partner with Hamilton or you would partner
4 with Hamilton for a termination meeting. She couldn't
5 have been clearer on that issue.

6 And, again, Ms. Kulwicki, her job is to be the
7 last protection for employees to make sure that Walmart
8 follows the law before an employee is fired to make sure
9 that it was a lawful termination. What does she do to
10 fulfill that duty? Absolutely nothing. She actually
11 testifies that it's just a goal; she really can't do it;
12 it's not just an unattainable goal. That's the law.

13 I'm trying to skip through a little bit.

14 And, finally, Walmart fired a 13-year employee
15 for unlawful reasons. They took away her livelihood,
16 they caused her to suffer emotional distress, and then
17 they tried to say that she was eligible for rehire so it
18 would look better somehow. Well, we know that Maureen
19 reapplied for a perfect position with Walmart and didn't
20 even get called for an interview. Walmart has no
21 integrity or credibility. Walmart violated the law.

22 Now, I just want to talk briefly about the
23 specific legal claims. There are several separate legal
24 claims and that's because different laws protect
25 different types of activities and status.

1 There is a gender claim under both state and
2 federal law. It's the same evidence for gender
3 discrimination. They're just different types of
4 damages. You will see that on a verdict form that the
5 judge is going to give you.

6 Also Maureen was engaging in protected
7 activity that was covered both by New Hampshire's common
8 law wrongful termination and New Hampshire's
9 whistleblower protection law. Essentially, the same
10 thing because Walmart has agreed that Maureen had good
11 faith and reasonable beliefs to raise these safety --
12 which were legal -- concerns, but they're different
13 damages. So you'll see them separately on the verdict
14 form.

15 And the FMLA is separate because it's a
16 separate law.

17 Now, you may recall that we originally spoke
18 to you about a disability claim. Although Dr. Howe's
19 testimony, we believe, established that Maureen has
20 disabilities, as the evidence unfolded at trial, we did
21 not feel that we could prove by a preponderance of the
22 evidence that Mr. Certo was motivated to fire Maureen
23 because of the disabilities, so we voluntarily withdrew
24 that claim because we want you to consider the claims
25 that have the strong evidence. I just wanted to explain

1 that to you.

2 Now, you must decide what motivated Walmart to
3 fire Maureen. You may find that it was her
4 whistleblowing, also wrongful termination law, her FMLA
5 leave, and/or her gender. You can find in Maureen's
6 favor on some of her claims but not others or all of her
7 claims or none of her claims. Each unlawful reason does
8 not have to be the only or sole reason for the
9 termination. You do not have to pick one reason as the
10 reason.

11 We believe the evidence demonstrates that all
12 of Maureen's protected activity was happening at the
13 same time and it frustrated Mr. Certo and it motivated
14 him to get her fired and also that Walmart clearly
15 treats men more favorably than women. But it's up to
16 you to decide.

17 And as Attorney Fradette mentioned in the
18 opening argument, this is not a criminal case. This is
19 not a beyond a reasonable doubt standard. It is a
20 preponderance of the evidence standard. And that means
21 that you find that the issues are proven more probable
22 than not, more probably than not, that the elements of
23 the claims occurred. A good way to think of this is to
24 imagine the scales of justice. Place all of the
25 evidence in Maureen's favor on one side, all of the

1 evidence in Walmart's favor on the other. If the tip --
2 scales tip ever so slightly in Maureen McPadden's favor,
3 then she has met her burden of proof.

4 And, finally, I want to talk very briefly
5 about damages. I know this has been a long morning for
6 you and I want you to be able to get to lunch.

7 But the easy part is the economic damages. We
8 had an undisputed expert, Dr. Moore, here to testify.
9 He told you how he calculated the damages. He reduced
10 them to present value, which is what's required by the
11 law, and he told you that despite Maureen's efforts to
12 find -- diligent efforts to find comparable work, even
13 reapplying to Walmart, the best job that Maureen has
14 been able to find is the floating pharmacist position
15 with CVS which pays her significantly less.

16 Dr. Moore calculated the economic damages from
17 the date of termination to the date of trial, the wages
18 to be to be about \$164,000, and \$19,670 of lost benefits
19 for a total of back pay of \$183,700 -- sorry --
20 \$183,763.

21 You are going to have those exhibits in there
22 in the jury room. They're Exhibits 69 to 73.

23 Dr. Moore calculated that the economic losses
24 from the date of trial until retirement age are about
25 \$558,392. This is what's called front pay. So the

1 total economic losses that we are claiming are \$742,155.

2 And you will have that information with you.

3 And, by the way, since Mr. Varieur and
4 Mr. Certo are both gone -- no longer connected with the
5 Seabrook pharmacy store by early 2013, if Maureen had
6 not been fired, she would have -- we would all have
7 every reason to believe that Maureen could continue
8 working at Seabrook until her retirement.

9 The harder part for you to determine is
10 noneconomic losses. The first category is called
11 compensatory damages, to compensate Maureen for
12 emotional upset, loss of enjoyment of life, what did she
13 feel and experience because of the termination.

14 You heard that Maureen has never been
15 terminated from any job before in her life and she
16 was terminated for unlawful reasons.

17 You heard Maureen -- and I would say
18 particularly Ken McDevitt tried to describe how
19 devastating this was for Maureen. I'm not going to go
20 over that again, but I would ask you to please fully and
21 fairly compensate Maureen for that emotional distress.

22 And you heard Maureen describe that she's
23 grateful to have the job at CVS, but it is really
24 different from the job she had at Walmart. She's a
25 floater. She never has a schedule, she's not guaranteed

1 full-time hours, she often has a very long commute, and
2 she never gets to know the people that she works with or
3 the patients who come into the pharmacy, which was one
4 of the things she really enjoined when she worked for
5 Walmart. You are also allowed to consider that when you
6 consider compensatory damages.

7 I would submit to you that Maureen's
8 noneconomic damages are at least as significant as her
9 economic damages and would ask that you award an amount
10 that fully compensates her for emotional distress that
11 she continues to experience to this day.

12 The judge will instruct you that you are also
13 allowed to award enhanced compensatory damages on the
14 State gender discrimination claim if you find that
15 Walmart recklessly disregarded Maureen's rights under
16 that law. I would submit to you that both Mr. Certo's
17 unlawful disparate treatment of men versus women and
18 Ms. Kulwicki's failure to even try to ensure that the
19 laws were abided by or to know that there is an
20 antidiscrimination law in New Hampshire would support an
21 award of enhanced compensatory damages in this case.

22 Finally, the federal discrimination claim.
23 The gender discrimination claim allows you to award
24 punitive damages. That is the only claim where you are
25 allowed to award punitive damages. Those are awarded if

1 you find that Walmart recklessly disregarded the law as
2 well and those damages allow you to consider what will
3 stop a huge company like Walmart from doing this again
4 and to punish Walmart for its unlawful behavior. The
5 evidence in this case justifies an award of punitive
6 damages.

7 You will be receiving, as I've talked about,
8 something called a special verdict form from the judge
9 that helps you walk through each claim separately and to
10 determine liability and damages.

11 We truly appreciate the attention you've paid
12 to this case. We know that it's not easy to take time
13 out of your schedules to sit on a jury and I want you to
14 know that this case is very important to Maureen
15 McPadden and we hope that you will use this opportunity
16 to correct this injustice.

17 Thank you.

18 THE COURT: All right. Thank you
19 Attorney Irwin.

20 Would you mind taking that -- ladies and
21 gentlemen, that concludes the closing arguments in the
22 case. So let me again just remind you that closing
23 arguments, like opening statements, are not evidence.
24 To the extent the lawyers have made reference to
25 evidence or facts in the case that differ from what you

1 recall, it's your memory and your view that counts.

2 Similarly, both counsel made references to the
3 applicable law. Let me just remind you the jury takes
4 the law not from the advocates, obviously, but from the
5 Court in the instructions that I'll give you shortly.

6 Why don't we take a -- we'll take a brief
7 recess and then we'll come back and I'll instruct you on
8 the law that you're to apply in returning a verdict in
9 the case and then the case will be given to you to
10 deliberate and return a verdict.

11 (Jury excused.)

12 (IN OPEN COURT - NO JURY PRESENT)

13 THE COURT: I think Judy has copies -- you
14 have copies, right? Why don't you give the lawyers
15 copies and -- of the instructions and verdict form and
16 you can take a look at those.

17 MS. IRWIN: I just need to go get the last
18 copy -- could I just go get the last draft that we had?

19 THE COURT: Oh, sure. No, I'm going to give
20 you time during the break. We're going to take a little
21 break. And then you can just take a look at it to --
22 yeah, if you have a your copy marked up, you know what
23 to look for.

24 MS. IRWIN: Okay.

25 THE COURT: I think all the changes have been

1 made.

2 And then when I come back -- you don't have to
3 come up to sidebar. You can put on your objections to
4 the instructions before I give them and then I'll invite
5 you back up after I give the instructions to register
6 objections.

7 Okay. Good closings. Well done by both of
8 you. Well done. I'm pleased that they have all the
9 evidence and they have good closings. So it's up to
10 them.

11 MS. IRWIN: Thank you, your Honor.

12 (Recess.)

13 THE COURT: You probably noticed -- did you
14 get the verdict form as well?

15 MS. IRWIN: We did.

16 THE COURT: Yeah, we made some structural --
17 structural overstates it -- some organizational changes
18 that just make it a little more clear, I think. But
19 there were no substantive differences. But you can look
20 that over before the exhibits go in and if you do have
21 an issue, we can talk about it then.

22 All right. Would either side like to make
23 objections to the proposed charge?

24 MS. IRWIN: Your Honor, our only objection
25 would be that in the pretext instruction that goes on

1 pages 10 to 12, we think it would be an accurate
2 statement of the law to quote the *Harrington vs.*
3 *Aggregate Industries Northeast Region, Inc.* case, 668
4 F.3d 25 at page 33, First Circuit 2012, that talks about
5 in a retaliation case, a whole is sometimes greater than
6 the sum of the parts; the bits and pieces of evidence
7 taken collectively have significantly probative value.

8 Thank you, your Honor.

9 THE COURT: All right. Any objection to
10 giving that?

11 MR. KACZMAREK: Yes, your Honor.

12 THE COURT: All right.

13 Yeah, I've thought about it. I should say on
14 the record we've had one or two -- two, I guess --
15 informal charging conferences off the record to work out
16 agreements, disagreements, and so forth and I've given
17 some thought to that.

18 I find that language argumentative and I think
19 would confuse the jury. I think the instructions that
20 we have adequately inform them of what the applicable
21 law is.

22 MR. KACZMAREK: Thank you, your Honor.

23 Defendants have a number of objections to the
24 jury instructions, beginning with the comparative
25 evidence instruction that begins on page 8.

1 THE COURT: Page 8?

2 MR. KACZMAREK: Page -- goes from page 8 to
3 page 9.

4 THE COURT: All right.

5 MR. KACZMAREK: Defendant believes that the
6 comparative instruction to comply with the First Circuit
7 precedent must state that the comparator must be -- have
8 been disciplined by the same decision-maker as the
9 plaintiff. And among other cases, we'd cite the
10 *Champagne vs. Servistar* case, 138 F.3d 7 as support for
11 that, although there are certainly many other First
12 Circuit cases out there.

13 In addition, within the comparator
14 instruction, we don't believe there's a need, both
15 factually and a legally, for a companywide policy
16 instruction as in currently in there. There simply --
17 it's simply inappropriate in this context.

18 THE COURT: All right. Objection overruled.
19 This -- this strikes me as a classic case where the
20 evidence was very clear that there's an effort at least
21 by the company to have companywide policies, companywide
22 standardized discipline to the extent achievable, and,
23 in fact, the -- I guess Kulwicki was a common
24 denominator and a major -- major player in the decision
25 with respect to both the defendant -- I mean the

1 plaintiff and Mr. Tau.

2 Okay. Objection overruled.

3 MR. KACZMAREK: Thank you, Your Honor.

4 Moving on to the cat's paw instruction, under
5 *Ameen vs. Amphenol Printed Circuits*, a First Circuit
6 case from 2015, corporate liability can only attach if
7 the neutral decision-makers, when deciding to terminate
8 an employee, rely on information that is inaccurate,
9 misleading, or incomplete because of another employee's
10 discriminatory animus.

11 We don't believe the instruction accurately
12 captures that, your Honor.

13 THE COURT: All right.

14 MS. IRWIN: Well, your Honor, first of all,
15 there's a U.S. Supreme Court case which is *Staub*, which
16 was quoted in this instruction; and, secondly, we
17 certainly have evidence that's been presented to the
18 jury of both incomplete information and inaccurate
19 information.

20 THE COURT: Compared to Riel; is that it?

21 MS. IRWIN: Excuse me?

22 THE COURT: Compared to the Riel information
23 that was passed down; is that what you're saying?

24 MS. IRWIN: Correct.

25 THE COURT: All right. Objection overruled.

1 Okay.

2 MR. KACZMAREK: In addition, with regard to
3 the cat's paw instruction, we believe that the plaintiff
4 must provide specific evidence of unlawful animus by the
5 employee reporting information to the neutral
6 decision-maker. That's also the *Ameen* case.

7 THE COURT: Okay. Objection overruled.

8 MR. KACZMAREK: Moving on to the FMLA
9 instruction, your Honor, it's the defendant's position
10 that the causation standard for FMLA is significantly
11 higher than is articulated in the FMLA instruction. And
12 we cite to *Palmquist vs. Shinseki*, a First Circuit 2012
13 case, holding that, you know, but for causation applies
14 to retaliation claims under the retaliation -- or
15 Rehabilitation Act. And because the FMLA does not
16 reference the motivating factors standard that a but for
17 causation standard is more applicable.

18 And we'd also cite the *Chase vs. U.S. Postal*
19 *Service* case, a District of Mass case from 2013,
20 regarding that issue as well.

21 THE COURT: All right. Objection overruled.

22 MR. KACZMAREK: Thank you.

23 Moving on to the damages instruction regarding
24 the New Hampshire Law Against Discrimination, 354-a,
25 your Honor, it is defendant's position that the Court

1 decides the issue of enhanced compensatory damages, not
2 the jury. And there in support of that proposition we
3 cite *Hair Excitement vs. L'Oreal*, 153 NH 363, in which
4 the New Hampshire Supreme Court states that in its
5 ordinary meaning, the word "Court" refers to a judge
6 rather than a jury. We believe that that applies
7 equally in this --

8 THE COURT: Well, juries decide enhanced
9 compensatory damages under the New Hampshire common law.
10 The judge decides whether to give the instruction.
11 That's discretionary. I think, as we discussed last
12 evening, in this case, the statute incorporates
13 something the statute refers to as enhanced compensatory
14 damages, but then modifies it to the common law, with
15 understanding of it, I believe, to provide that in this
16 case, it's meant as a substitute or subject to a fine,
17 administrative fine.

18 And in this case, court damages normally are
19 determined by the -- by the jury and I find in this case
20 that the jury, as they would in the common law situation
21 in New Hampshire law, should properly determine the
22 damages.

23 But, if it makes you feel any better, I'll
24 treat it as an advisory verdict if they return damages
25 on that score and probably will go along with it. But

1 I'll consider it.

2 MR. KACZMAREK: Thank you, Your Honor.

3 Moving on to the punitive damages instruction,
4 defendant believes that there's no basis for a punitive
5 damages instruction in this case. The only statute --
6 statutory claim remaining for which punitive damages are
7 available is Title VII. And a plaintiff in a Title VII
8 case is not entitled to a punitive damages instruction
9 when the plaintiff has presented no evidence from which
10 a reasonable jury can conclude that an employer acted
11 with malice or reckless indifference to federally
12 protected rights.

13 THE COURT: All right. I -- thank you.

14 Any -- oh, go ahead.

15 MR. KACZMAREK: Sorry. I'll give you the case
16 cite, if you like, your Honor. 422 F.3d 8, *McDonough*
17 *vs. City of Quincy*.

18 THE COURT: All right. I disagree. Objection
19 overruled.

20 Any other objections?

21 MR. KACZMAREK: Two more quick objections,
22 your Honor.

23 With regard to pretext and temporal proximity,
24 we believe that there's no basis here for an instruction
25 regarding customary and usual business practices.

1 THE COURT: Okay. Objection overruled.

2 MR. KACZMAREK: And we reiterate our request
3 for a mitigation of damages instruction, your Honor.

4 THE COURT: All right. As I explained off the
5 record and I'll explain on the record, I don't find it
6 appropriate to give a mitigation of damages instruction
7 on behalf of the defendant in this case because there's
8 no evidence of any failure by the plaintiff to make an
9 effort to reasonably mitigate damages, first and
10 foremost; second, there's rather overwhelming evidence
11 that she exerted more than reasonable efforts to
12 mitigate damages, in fact, super efforts to mitigate
13 damages; and, finally, ironically, and perhaps somewhat
14 humorously in a case such as this, Walmart itself had
15 within its power the ability to mitigate damages in this
16 case completely by rehiring her when she applied for
17 reinstatement. And for reasons best satisfactory to
18 Walmart, whatever they might have been, they decided not
19 to assist the plaintiff in mitigating her damages by
20 hiring her.

21 So I'm not going to give that instruction.

22 MR. KACZMAREK: All right.

23 THE COURT: Objection overruled.

24 Okay.

25 MR. KACZMAREK: Thank you, Your Honor.

1 MR. FRADETTE: Your Honor, the exemplified
2 copies of the decisions in the other cases with respect
3 to punitives, should I present that to the Court now or
4 is that --

5 THE COURT: It's a little late. The case is
6 over. The evidence is closed.

7 All right. Anything else?

8 MR. KACZMAREK: No, your Honor.

9 THE COURT: Okay. I'll instruct the jury and
10 then I'll invite you back to the sidebar and you can
11 make -- put your objections -- you're required under the
12 rule to put your objections again on the record.

13 (IN OPEN COURT - JURY PRESENT)

14 THE COURT: All right. Ladies and gentlemen,
15 we've reached that part of the trial when I'm to
16 instruct you on the law that you're to apply in
17 resolving the dispute between plaintiff and the
18 defendant.

19 You've each found on your seat a written copy
20 of the instructions on the law that I'm about to give
21 you. Some people do well just listening. Some people
22 do well reading along. Whatever's best for you as an
23 individual is fine with me. You can either just listen
24 or you can read along. But please don't read ahead.
25 That's the only request.

1 What was I going to say about this? I don't
2 know. That should be it. If it occurs to me, I'll
3 cover it later.

4 All right. I'll now instruct the jury.

5 JURY INSTRUCTIONS

6 THE COURT: At this stage of the trial, it is
7 my duty to instruct you on the principles of law that
8 you must apply in deciding this case. It is your duty
9 to follow these instructions during your deliberations.
10 You should not single out any one instruction but
11 instead apply these instructions as a whole to the
12 evidence in this case.

13 You are the exclusive judges of the facts.
14 You must weigh the evidence that has been presented
15 impartially, without bias, without prejudice, and
16 without sympathy. You must determine what the facts are
17 and what the truth is, based upon the evidence presented
18 in the case. You will decide the case by applying the
19 law as I give it to you in these instructions to the
20 facts as you find them to be from the evidence.

21 In determining what the facts are, what the
22 truth is, you should -- you must necessarily assess the
23 credibility of each witness and determine what weight
24 you will give to each witness's testimony. By
25 credibility I mean the believability or the truthfulness

1 of a witness.

2 You should carefully scrutinize all the
3 testimony given, the circumstances under which each
4 witness has testified, and every matter in evidence
5 which tends to show whether a witness is worthy of
6 belief or not worthy of belief. You should also
7 consider the extent, if any, to which the testimony of
8 each witness is either supported or contradicted by
9 other evidence in the case.

10 After assessing the credibility of each
11 witness, you will assign to the testimony of each
12 witness, both under direct and cross-examination, such
13 weight as you deem proper. You are not required to
14 believe the testimony of a witness simply because that
15 witness was under oath. You may believe or disbelieve
16 all or part of the testimony of any witness. It is
17 within your province to determine what testimony is
18 worthy of belief and what testimony may not be worthy of
19 belief.

20 The testimony of a witness may be discredited
21 or, as we sometimes say, impeached, by showing that the
22 witness previously made statements that are different
23 than or inconsistent with his testimony -- his or her
24 testimony here in court. You must decide what weight,
25 if any, should be given to the testimony of a witness

1 who has made prior inconsistent or contradictory
2 statements. In making that determination, you may
3 consider whether the witness purposely made a false
4 statement or whether it was an innocent mistake; whether
5 the inconsistency concerns an important fact or whether
6 it had to do with a small detail; whether the witness
7 had an explanation for the inconsistency and whether
8 the -- that explanation appealed to your common sense.

9 If a person is shown to have knowingly
10 testified falsely about any important matter, you
11 obviously have a right to distrust the testimony of that
12 person concerning other matters. You may reject all of
13 the testimony of that witness or give it such weight as
14 you may think it deserves.

15 You have heard testimony from witnesses who
16 were permitted to testify as experts. An expert is
17 allowed to express an opinion on those matters about
18 which he or she has special knowledge and training.
19 Expert testimony is presented to you based on the belief
20 that someone who is experienced in a particular field
21 can assist you in understanding the evidence or in
22 reaching an independent decision on the facts.

23 In weighing an expert's testimony, you may
24 consider the expert's qualifications, experience,
25 training, the reasons for testifying, as well as all of

1 the other considerations that ordinarily apply when you
2 are deciding whether or not to believe a witness's
3 testimony. You may give the expert testimony such
4 weight, if any, as you find it deserves in light of the
5 all of the evidence in this case. You should not,
6 however, accept the testimony of an expert witness
7 merely because that witness is an expert, nor should you
8 substitute the opinions of an expert for your own
9 reason, judgment, and common sense. In the end, the
10 determination of the facts in the case rests solely with
11 you.

12 The weight of the evidence is not necessarily
13 determined by the number of witnesses testifying on
14 either side. You will consider all the facts and
15 circumstances in evidence to determine which of the
16 witnesses are worthy of belief. You may find that the
17 testimony of a small number of witnesses on a particular
18 issue is more credible than the testimony of a greater
19 number of witnesses on the other side of the same issue.
20 It is not the number of witnesses or the quantity of
21 testimony that is important, but the quality of the
22 evidence that has been produced that is important.

23 There are two types of evidence that you may
24 properly use in deciding this case.

25 Direct evidence is the testimony given by a

1 witness about what that witness has seen, heard, or
2 observed or what that witness knows based on personal
3 knowledge. Direct evidence also includes any exhibits
4 that have been admitted and any stipulations that have
5 been agreed to by the lawyers. During the course of the
6 trial, you were told that the parties agreed or
7 stipulated to certain facts. This simply means that
8 both sides accept those facts to be true. Because there
9 is no disagreement regarding those facts, there was no
10 need for either side to introduce evidence relating to
11 them. You must accept as true the facts to which the
12 parties have stipulated.

13 So, for example, you have heard that the
14 parties stipulated that Ms. McPadden was engaged in
15 conduct protected by the FMLA when she requested leave
16 time and notified Walmart that she might need additional
17 leave time in the future. Similarly, the parties have
18 stipulated that Ms. McPadden reported in good faith what
19 she actually and reasonably believed constituted
20 violations of the law.

21 Evidence may also be used to prove a fact by
22 implication and this is referred to as circumstantial
23 evidence. In other words, from examining direct
24 evidence, you may be able to draw certain inferences
25 that are reasonable and justified in light of your daily

1 experience and common sense. Such reasonable inferences
2 constitute circumstantial evidence.

3 The law makes no difference -- no distinction
4 between the weight to be given to either direct or
5 circumstantial evidence. It is up to you to decide how
6 to weigh the evidence in this case.

7 The evidence in this case consists of: One,
8 the sworn testimony of the witnesses, both on direct and
9 cross-examination, regardless of who may have called
10 those witnesses; two, the exhibits that have been
11 admitted into evidence, regardless of who may have
12 produced them; and, three, any facts to which the
13 lawyers have agreed or stipulated.

14 Certain things are not evidence and you cannot
15 consider them as evidence.

16 Arguments, statements, and questions by the
17 lawyers are not evidence. Questions asked by the
18 lawyers and what the lawyers have said in their opening
19 statements, closing arguments, and at other times during
20 the course of the trial is intended to help you
21 interpret the evidence, but it is not evidence. If the
22 facts as you remember them differ from the way the
23 lawyers have stated them, your memory controls.

24 Objections by the lawyers are not evidence.
25 Lawyers have a duty to object when they believe a

1 question is improper under the rules of evidence. I
2 must rule on objections and I have not intended to
3 indicate in any way by my rulings or by what I have said
4 what the verdict should be in this case. You should not
5 be influenced by the lawyers' objections or by my
6 rulings on those objections.

7 Testimony that has been excluded or stricken
8 or that I have instructed you to disregard is not
9 evidence and must not be considered in any way in your
10 deliberations.

11 Anything you may have seen or heard when the
12 court was not in session is not evidence. You must
13 decide the case solely on the evidence received at
14 trial.

15 As you know, the defendant in this case,
16 Walmart, is a corporation. Because a corporation can
17 only act through its employees and agents, any act or
18 failure to act by an employee, officer, representative,
19 or other agent of Walmart in the performance of his or
20 her duty is held by the law to be the act or failure to
21 act of Walmart. Therefore, whenever I use the term
22 "defendant" or speak of Walmart, I am referring to
23 Walmart acting through its employees, officers,
24 representatives, and agents.

25 In all other respects, a corporation must be

1 treated no differently from an individual litigant.
2 Walmart is to be treated in the same manner as any other
3 party that is involved in litigation. All litigants are
4 equal before the law and corporations, big and small,
5 are entitled to the same fair consideration as you would
6 give any other individual party.

7 Ms. McPadden has sought to establish her claim
8 of gender-based discrimination by arguing that similarly
9 situated male employees did not receive the same level
10 of discipline as Ms. McPadden for similar conduct. For
11 those to be valid comparators, Ms. McPadden must
12 establish that those other employees were similarly
13 situated in all relevant respects. That, for example,
14 they were subject to the same companywide policies or
15 standards and that they engaged in the same conduct
16 without mitigating circumstances that would distinguish
17 their conduct or Walmart's treatment of them for it.
18 The comparators need not be perfect replicas. The
19 question is whether a prudent person looking objectively
20 at the facts would think them roughly equivalent.

21 As the plaintiff in this case, Ms. McPadden
22 bears the burden of proving by a preponderance of the
23 evidence each of the essential elements of her claims.
24 A preponderance of the evidence simply means that
25 quantity and quality of evidence necessary to persuade

1 you that a party's claim is more likely true than not
2 true. Think of a set of scales. At the beginning of
3 the trial, they are perfectly balanced and even. At the
4 end of the trial, if they have been tilted by the
5 evidence ever so slightly toward Ms. McPadden on a
6 particular element, then she has met her burden as to
7 that element. If, on the other hand, the scales remain
8 even or if they tip ever so slightly in the defendant's
9 favor, then the plaintiff has not met her burden.

10 In deciding whether any fact has been proven
11 by a preponderance of the evidence, you may, unless
12 otherwise instructed, consider the testimony of all
13 witnesses, regardless of who may have called them, and
14 all exhibits admitted into evidence, regardless of who
15 may have produced them.

16 Ms. McPadden is not required to produce direct
17 evidence of an unlawful motive to terminate her
18 employment. She may instead produce circumstantial
19 evidence of unlawful motive. That means you may infer
20 knowledge and/or motive as a matter of reason and common
21 sense from the existence of other facts, for example,
22 temporal proximity between the plaintiff's exercise of a
23 protected right and the retaliatory acts she claims
24 Walmart committed, and/or explanations that Walmart gave
25 for its actions that you find were really pretextual.

1 Pretextual means false or, although true, not the real
2 reason for the action taken. Ms. McPadden claims that
3 Walmart's stated reason for firing her for having lost
4 the pharmacy key while on a second-level coaching is not
5 the true reason, but is instead a pretext to cover up
6 for unlawful discrimination and/or retaliation. A
7 plaintiff can establish pretext -- that "is" should be
8 stricken.

9 A plaintiff can establish pretext by showing
10 weaknesses, inconsistencies, and/or contradictions in
11 the employer's proffered explanation for its decision to
12 discipline or fire the employee. A plaintiff may also
13 establish pretext by showing that the employer departed
14 from its customary and usual practices.

15 If you do not believe the reason Walmart has
16 given for terminating Ms. McPadden's employment, then
17 you may, but are not required to, infer that
18 Ms. McPadden's protected status, her gender, and/or her
19 protected conduct, requesting FMLA leave and/or
20 reporting alleged violations of the law, was a factor
21 that influenced Walmart's decision to fire her. But
22 remember that as to each of her individual claims,
23 Ms. McPadden bears the burden of persuading you by a
24 preponderance of the evidence that Walmart terminated
25 her employment because of the claimed unlawful

1 discrimination and/or retaliation and that it would not
2 have fired her were it not for that particular unlawful
3 motive. Ms. McPadden must do more than merely impugn
4 the veracity of Walmart's explanation for disciplining
5 and ultimately firing her. She must also persuade you
6 by a preponderance of the evidence that Walmart's stated
7 explanation is not only false, but also that it is
8 intended to cover up its true unlawful discriminatory
9 and/or retaliatory motive.

10 So if you credit the reasons offered by
11 Walmart for its decision to fire Ms. McPadden as true,
12 then you must return a verdict for Walmart on each of
13 Ms. McPadden's discrimination and retaliation claims.

14 If, however, you determine that Walmart's
15 proffered explanation is false, then you may, but are
16 not required to, infer the existence of discrimination
17 and/or retaliation from the falsity of Walmart's
18 explanation. If you determine that Walmart's
19 explanation is not worthy of credence and if you also
20 find that a preponderance of the evidence, whether
21 direct or circumstantial, supports one or more of
22 Ms. McPadden's claims that Walmart unlawfully
23 discriminated and/or retaliated against her, you must
24 return a verdict in favor of the plaintiff on that claim
25 or those claims.

1 In its defense to Ms. McPadden's claims of
2 retaliation, Walmart says that Ms. Barbara Kulwicki,
3 divisional senior human resources manager, and
4 Ms. Heather McCaffrey, market manager, were the only
5 people who made the decision to fire Ms. McPadden.
6 Walmart also claims that Ms. Kulwicki and Ms. McCaffrey
7 were unaware of Ms. McPadden's reports of public safety
8 concerns. It also says Ms. Kulwicki was aware of
9 Ms. McPadden's FMLA leave, but Ms. McCaffrey was not.
10 Mr. Certo was aware of Ms. McPadden's FMLA leave and
11 reports of public safety concerns and her report of a
12 HIPAA privacy violation. Ms. McPadden claims that
13 Mr. Certo was a decision-maker with respect to her
14 termination. Whether Mr. Certo was a decision-maker is
15 an issue in dispute which you must resolve.

16 If you find that Ms. Kulwicki and
17 Ms. McCaffrey were the people that made the final
18 decision to terminate Ms. McPadden's employment, and if
19 you find that they were unaware of Ms. McPadden's FMLA
20 protected activity and her reports of public safety and
21 legal concerns, I instruct you that a corporation such
22 as Walmart is nevertheless liable for unlawful
23 discrimination and/or retaliation even when so-called
24 neutral decision-makers such as Ms. Kulwicki and
25 Ms. McCaffrey made the final termination decision if you

1 find by a preponderance of the evidence that a
2 supervisor, like Mr. Certo, performed an act motivated
3 by retaliatory animus that he intended to cause the
4 adverse employment action and if that act caused Walmart
5 to take adverse action that it would not have otherwise
6 taken.

7 In other words, if you find that Ms. Kulwicki
8 and Ms. McCaffrey did not personally have a retaliatory
9 motive for terminating Ms. McPadden's employment,
10 Walmart can be liable for retaliatory termination if you
11 find by a preponderance of the evidence that Mr. Certo
12 was motivated by retaliation and performed an act that
13 was intended to cause Ms. Kulwicki or Ms. McCaffrey to
14 fire Ms. McPadden and you also find that Mr. Certo's act
15 actually caused them to fire Ms. McPadden.

16 When assessing Ms. McPadden's claim that the
17 reason given by Walmart for her termination is not true,
18 you should focus on Walmart's motivation for firing her,
19 not its business judgment. As I will discuss in more
20 detail in a moment, Ms. McPadden was what is known as an
21 employee at will. That means she did not have an
22 employment contract with Walmart and an employer may
23 fire or discipline an employee at will for any
24 nondiscriminatory reason it sees fit, just as an
25 employee at will may quit her job at any time for any

1 reason she sees fit.

2 While an employer's judgment or treatment of
3 an employee at will may seem unwise or erroneous to
4 outside observers, the relevant question presented to
5 you with respect to each of Ms. McPadden's individual
6 claims is simply whether Walmart's stated reason for
7 firing Ms. Ms. McPadden was actually a pretext for
8 unlawful discrimination or retaliation. To be
9 legitimate, an employer's reason for terminating an
10 employee must be nondiscriminatory, but it does not have
11 to be a reason that you, the jury, would necessarily
12 approve or act on. An employer is entitled to make its
13 own policy and business judgments as long as they are
14 not a pretext for unlawful discrimination or
15 retaliation. In that regard, Ms. McPadden's personal
16 opinions and assessment of her own qualifications and
17 job performance are not relevant. Instead, you must
18 focus on Walmart's perceptions, judgment, and motivation
19 in determining whether it acted unlawfully.

20 Ms. McPadden advances three categories of
21 claims against Walmart: One, unlawful discrimination
22 based upon her gender; two, retaliation based upon her
23 invocation of leave time under the Family and Medical
24 Leave Act, the FMLA, and based upon her having reported
25 that she reasonably and in good faith believed -- what

1 she reasonably and in good faith believed were
2 violations of the law; and, three, wrongful termination
3 in response to her having reported allegedly unsafe
4 working conditions in the pharmacy. I will instruct you
5 on the law applicable to each claim you must resolve.
6 You must consider each claim separately. Your verdict
7 with respect to a particular legal claim should not
8 control your verdict as to any other claim.

25 Ms. McPadden need not prove that gender

1 discrimination was the only or even the predominant
2 factor that motivated Walmart. In fact, you may decide
3 that other factors were involved as well in Walmart's
4 decision-making process. But, in order to return a
5 verdict in favor of plaintiff on her Title VII gender
6 discrimination claim, you must conclude that she has
7 proved by a preponderance of the evidence that although
8 there may have been other factors, she would not have
9 been fired but for the gender discrimination.

10 As I mentioned a moment ago, an employer is
11 free to fire an employee for any nondiscriminatory
12 reason it wishes, even if its business judgment seems
13 objectively unwise. But you may consider the
14 believability of an explanation in determining whether
15 it is a cover-up or pretext for discrimination.

16 Next Ms. McPadden alleges that Walmart
17 discriminated against her on the basis of her gender in
18 violation of New Hampshire's Law Against Discrimination.
19 That law makes it unlawful for an employer to
20 discriminate against an employee based upon that --
21 because of that person's gender.

22 In determining whether Ms. McPadden has proved
23 her claim under New Hampshire's Law Against
24 Discrimination, you shall apply the same standards and
25 the same definitions you applied in resolving her

1 federal gender discrimination claims. Again,
2 Ms. McPadden must prove by a preponderance of the
3 evidence a causal connection between her gender and
4 Walmart's decision to terminate her employment.

5 Ms. McPadden advances both a state and a
6 federal claim that Walmart unlawfully retaliated against
7 her. First, she alleges that Walmart unlawfully
8 retaliated against her in violation of the Family and
9 Medical Leave Act for having taken FMLA leave and
10 indicating that she would likely require FMLA leave in
11 the future for her serious medical condition. She also
12 alleges that Walmart unlawfully retaliated against her
13 in violation of New Hampshire's Whistleblowers'
14 Protection Act for having reported what she reasonably
15 and in good faith believed were violations of the law.

16 The Family and Medical Leave Act makes it
17 unlawful for an employer to retaliate against an
18 employee who requests and/or takes leave authorized by
19 the FMLA. To prevail on her claim that Walmart
20 retaliated against her for having invoked her FMLA
21 rights, Ms. McPadden must prove by a preponderance of
22 the evidence each of the following essential elements:
23 A, that she engaged in a protected activity under the
24 FMLA; that is, she requested and took leave and
25 indicated that she might need leave in the future for

1 her serious medical condition; and, B, that she was
2 subjected to an adverse job action, that is, she was
3 disciplined, resulting in the termination of her
4 employment; and, C, that although there may have been
5 other factors, were it not for her protected FMLA
6 activity, Walmart would not have fired her.

7 Protected activity. As to the first element
8 of her FMLA retaliation claim, the parties have agreed
9 or stipulated that Ms. McPadden was engaged in activity
10 protected under the FMLA when she requested and took
11 leave and indicated that she might need additional leave
12 in the future. Again, Ms. McPadden need not prove
13 termination because of protected conduct.

14 Again, Ms. McPadden need not prove that her
15 request for FMLA leave was the only or even the
16 predominant factor that motivated Walmart to fire her.
17 In fact, you may decide that other factors were also
18 involved in Walmart's decision-making process. But in
19 order to return a verdict in favor of plaintiff on her
20 FMLA retaliation claim, you must conclude that she has
21 proved by a preponderance of the evidence a causal
22 connection between her discharge and her invocation of
23 rights under the FMLA; that although there may have been
24 other factors, she would not have been fired if Walmart
25 had not retaliated against her for invoking her FMLA

1 rights.

2 Elements of the whistleblower claim.

3 New Hampshire law provides that an employer cannot
4 discharge, threaten, or otherwise discriminate against
5 an employee because the employee in good faith reports
6 what the employee has reasonable cause to believe is a
7 violation of any law or regulation. Here Ms. McPadden
8 claims she was fired because she reported to Walmart
9 what she reasonably believed to be a violation of the
10 law when other employee -- when another employee of
11 Walmart disclosed her confidential medical and
12 prescription information and when she reported what she
13 believed were safety issues in the pharmacy.

14 To prevail on her state Whistleblowers'
15 Protection Act claim, Ms. McPadden must prove by a
16 preponderance of the evidence that: A, Ms. McPadden,
17 acting in good faith, reported what she actually and
18 reasonably believed constituted violations of the law;
19 and, B, Walmart terminated Ms. McPadden's employment
20 because of her report or reports.

21 As to the first element of Ms. McPadden's
22 whistleblower claim, the parties have stipulated that
23 she reported in good faith what she both actually and
24 reasonably believed constituted violations of the law.
25 Accordingly, the parties were not required to offer

1 evidence on that element.

2 To satisfy the second element of her claim,
3 Ms. McPadden must prove that Walmart terminated her
4 employment because she made the report. That is to say,
5 Ms. McPadden must prove, by a preponderance of the
6 evidence, that there was a causal connection between her
7 making a report and Walmart's subsequent decision to
8 discipline her, resulting in her termination; that were
9 it not for her having made the report, Walmart would not
10 have terminated her -- her employment.

11 Ms. McPadden need not prove that she -- that
12 her having made those reports was the only or even the
13 predominant factor that motivated Walmart. In fact, you
14 may decide that other factors were involved as well in
15 Walmart's decision-making process, but in order to
16 return a verdict in favor of plaintiff on her
17 whistleblower claim, you must conclude that she has
18 proved by a preponderance of the evidence that although
19 there may have been other factors, she would not have
20 been fired but for her having made those reports.

21 Wrongful termination. Ms. McPadden did not
22 have an employment contract with Walmart. She was there
23 for what is known as an employee at will. When parties
24 agree on employment at will, either party may terminate
25 that agreement at any time with or without cause or

1 justification. So as I mentioned earlier, an employer
2 may fire an at-will -- an employee at will at any time
3 for any nondiscriminatory reason or for no reason at
4 all, as the employer sees fit. The same is true for the
5 employee who may quit at any time with or without a
6 reason.

7 There is, however, an important exception to
8 the general rule. The law attempts to balance the
9 employer's interest in running its business as it sees
10 fit with the employee's interest in maintaining her
11 employment. So to maintain a proper balance between
12 those two interests, it is necessary to consider the
13 public interest. This gives an employee the right to
14 seek recovery of damages claiming what is known as
15 wrongful termination of an at-will employee --
16 employment in certain specific circumstances.

17 To prevail on her claim that Walmart
18 wrongfully terminated her at-will employment,
19 Ms. McPadden must prove by a preponderance of the
20 evidence the following two essential elements: A, that
21 Walmart's decision to fire her was motivated by bad
22 faith, malice, or retaliation; and, B, that Walmart
23 fired her because she performed some act that public
24 policy would encourage.

25 Bad faith is, of course, the opposite of good

1 faith. It is the act of doing something not by mistake,
2 but because of some sinister motive. An act done with
3 malice is done with malice if it is undertaken not only
4 with ill will, evil motive, or an intent to injure, but
5 also with a wanton disregard for the rights of others
6 and the consequences likely to follow.

7 Retaliation is the act of doing something in
8 order to punish a person because of some wrong, real or
9 imagined, that the person supposedly committed against
10 the person retaliating. It is described in the
11 vernacular as getting even.

12 As to the first element of plaintiff's burden
13 of proof, it is sufficient if she proves by a
14 preponderance that Walmart acted with any one or more of
15 those unlawful motives: Bad faith, malice, or
16 retaliation.

17 The second element that Ms. McPadden must
18 prove is what I've called the public policy exception.
19 That is, Ms. McPadden must prove that Walmart fired her
20 because she performed an act that public policy would
21 encourage. For example, reporting for jury duty.

22 Here, Ms. McPadden claims that she was engaged
23 in conduct that public policy encourages, reporting what
24 she reasonably believed were HIPAA and safety issues in
25 the Seabrook pharmacy. The parties have stipulated that

1 she reported in good faith what she both actually and
2 reasonably believed constituted violations of the law.
3 Accordingly, the parties were not required to offer
4 evidence on that element.

5 Ms. McPadden claims that Walmart, motivated by
6 bad faith, malice, or retaliation, fired her because she
7 made those reports. Again, to prevail on that claim,
8 Ms. McPadden must prove, by a preponderance of the
9 evidence, that Walmart was motivated by bad faith,
10 malice, or retaliation and it would not have fired her
11 if she had not reported those alleged safety issues.

12 You should consider all of the evidence that
13 has been presented to you in determining whether or not
14 Ms. McPadden has proved by a preponderance of the
15 evidence any one or more of her claims. If you find
16 that she has met her burden of proof on the issue of
17 liability on one or more claims, then you will go on to
18 consider the proper measure of damages. If, on the
19 other hand, you find that Ms. McPadden has not met her
20 burden of proof on the issue of liability on any of her
21 claims, then you will conclude your deliberations and
22 return a verdict for the defendant.

23 You must not compromise between the liability
24 issue and the damages issue. You must determine the
25 issue of liability first; that is, whether Ms. McPadden

1 has proved each of the essential elements of one or more
2 of her claims against Walmart. You should proceed to
3 the damages issue only if you have determined that the
4 plaintiff has proved at least one of her claims by a
5 preponderance of the evidence.

6 I will now instruct you on the law applicable
7 to awarding damages. You should not consider the fact
8 that I am instructing you as to the proper measure of
9 damages as indicating in any way that the plaintiff is
10 entitled to damages. These instructions as to the
11 measure of damages are given to you for your guidance in
12 the event that you should find in favor of the plaintiff
13 on one or more of her claims in accordance with the
14 instructions I've just given you.

15 The principal or paramount rule in awarding
16 damages is that every person unjustly deprived of his or
17 her rights should be fully and fairly compensated for
18 the injuries sustained. The object of damages is to
19 give compensation to the party injured for the actual
20 loss sustained. It is a rational and legal principle
21 that the compensation should be equivalent to the
22 injury.

23 Even though she has advanced a number of legal
24 theories of recovery, Ms. McPadden can only recover once
25 for any particular loss or injury. Therefore, if

1 Ms. McPadden's claims arise out of a common core of
2 facts, only a single recovery will be made even if you
3 find for Ms. McPadden on one or more -- on more than one
4 of her claims.

5 If you find that Ms. McPadden is entitled to
6 damages in accordance with these instructions, then you
7 should award her that sum of money that will fairly,
8 justly, and reasonably compensate her for all of the
9 damage suffered as a direct result of Walmart's wrongful
10 conduct. Ms. McPadden is entitled to full, fair, and
11 adequate compensation for the injuries and the results
12 of the injuries sustained. No more and no less.

13 A person who seeks damages has the burden of
14 proving that it is more probable than not that the
15 damages for which compensation is sought were caused as
16 a direct result of the conduct of the defendant.
17 Additionally, she must show the nature, extent, and
18 amount of those damages. So the burden is on
19 Ms. McPadden to prove by a preponderance of the evidence
20 each item of damage she says she suffered and to prove
21 that each item was caused by Walmart's unlawful conduct.
22 Ms. McPadden is not required to prove the exact amount
23 of her damages, but she must introduce sufficient
24 evidence to permit you to make a reasonable estimate of
25 each item. If Ms. McPadden fails to do so, then she

1 cannot recover for that item.

2 In determining the amount of damages, if any,
3 to allow Ms. McPadden, you may draw such inferences from
4 the evidence of the nature of her injuries and the
5 results thereof as are justified by your common
6 experience. Damages are not to be awarded on the basis
7 of guesswork or speculation or on the basis of passion,
8 prejudice, or sympathy. Instead, they must be awarded,
9 if at all, based upon your assessment of what full and
10 fair compensation should be.

11 You may award compensatory damages only for
12 injuries that Ms. McPadden has proved were proximately
13 caused by Walmart's alleged wrongful conduct.
14 Compensatory damages are not allowed as a punishment and
15 cannot be imposed or increased to penalize the
16 defendant, nor should you award compensatory damages for
17 speculative injuries. They may be awarded only for
18 injuries that Ms. McPadden has actually suffered or that
19 she is reasonably likely to suffer in the future as a
20 consequence of Walmart's allegedly unlawful conduct.

21 You may consider the following elements of
22 compensatory damages: Pain and suffering, reasonable
23 compensation for pain, suffering, and mental anguish
24 which you find from a preponderance of the evidence was
25 caused by Walmart's unlawful termination of Ms. McPadden

1 and which Ms. McPadden has experienced to date and any
2 such pain, suffering, and mental anguish which you find
3 from a preponderance of the evidence she will probably
4 experience in the future. There is no standard
5 prescribed by law by which to fix reasonable
6 compensation for pain, suffering, and mental anguish.
7 In making an award for this element, you should exercise
8 your reasonable judgment and determine damages that are
9 full, fair and adequate in light of the evidence.
10 Ms. McPadden may not recover for any pain, suffering, or
11 mental anguish which she suffered as a result of factors
12 other than her allegedly unlawful termination by
13 Walmart.

14 If you find that Walmart unlawfully fired
15 Ms. McPadden in violation of the FMLA, Title VII,
16 New Hampshire's Law Against Discrimination, the
17 Whistleblowers' Protection Act and/or wrongfully
18 terminated her employment, she is entitled to the back
19 pay she would have earned if she had not been wrongfully
20 fired from the date of her termination, November 27,
21 2012, through the date of your verdict. This amount
22 consists of the wages and employee benefits Ms. McPadden
23 would have received but for her wrongful discharge. It
24 includes not only wages, salary, and fringe benefits,
25 but also raises, vacation and sick pay, bonuses,

1 cost-of-living expenses, group life contributions,
2 profit-sharing and retirement or pension plans.

3 To calculate the amount of back pay to which
4 plaintiff is entitled, you should first determine the
5 wages and employee benefits she would have received from
6 Walmart from the time she was fired through your
7 verdict. Then you should subtract from that amount the
8 wages and employee benefits Ms. McPadden received from
9 other employment during that period of time.

10 Ms. McPadden must prove the amount of her back pay
11 damages by a preponderance of the evidence. In making
12 that determination, you may, to the extent you find it
13 credible and reliable, rely on the testimony of
14 Dr. Craig Moore who Ms. McPadden retained as an
15 economist in this case.

16 Front pay. If you find that Ms. McPadden has
17 proved by a preponderance of the evidence that Walmart
18 wrongfully terminated her employment and/or that it
19 terminated her employment in violation of the FMLA,
20 New Hampshire's Law Against Discrimination, Title VII,
21 and/or Whistleblowers' Protection Act, then you should
22 also determine the amount of damages that will fairly
23 compensate her for the amount of wages and fringe
24 benefits she reasonably would have received in her
25 employment with Walmart in the future. That is, from

1 the date of your verdict forward. This is referred to
2 as front pay. To calculate the amount of front pay to
3 which Ms. McPadden is entitled, you should determine the
4 wages and employee benefits she reasonably would have
5 received from Walmart from the date of your verdict
6 until the date on which Ms. McPadden would have left her
7 employment with Walmart. Ms. McPadden must prove the
8 amount of front pay damages by a preponderance of the
9 evidence.

10 An award of front pay for future wages and
11 employee benefits necessarily requires that payment be
12 made now for a loss that Ms. McPadden will not actually
13 suffer until some future date. So if you find that
14 Ms. McPadden is entitled to damages for front pay, then
15 you must determine the present value in dollars of such
16 damages.

17 To calculate the present value of future wages
18 and employee benefits, you must reduce the front pay
19 award by the amount of interest that Ms. McPadden could
20 earn on the amount of the award if she made a relatively
21 risk-free investment. The reason why you must make this
22 reduction is because an award of an amount representing
23 future wages and employee benefits is more valuable to
24 Ms. McPadden if she receives it today than if she
25 received it in the future. It is more valuable because

1 she can earn interest on it for the period of time
2 between the date of the award and the date on which she
3 would have actually earned the money had she not been
4 terminated. Thus, you should adjust the amount of any
5 award for front pay by the amount of interest that
6 Ms. McPadden can earn on that amount over time.

7 Again, in making that determination, you may,
8 to the extent you find it credible and reliable, rely on
9 the testimony of Dr. Craig Moore.

10 Ms. McPadden has brought her claims under both
11 state and federal law. Each of those laws permit a
12 different type of damage award. Under certain
13 circumstances, federal law permits you to award
14 Ms. McPadden what are known as punitive damages. Under
15 certain circumstance, state law permits you to award
16 Ms. McPadden what are known as enhanced compensatory
17 damages. Finally, under certain circumstances, the FMLA
18 permits you to award Ms. McPadden what are known as
19 liquidated damages. I will now explain those different
20 types of damages for you.

21 Liquidated damages under the FMLA are damages
22 equal in amount to the wages, salary, employment
23 benefits, or other compensation that Ms. McPadden has
24 proved by a preponderance of the evidence she lost or
25 was denied by reason of Walmart's retaliation against

1 her in violation of the FMLA. In addition to
2 compensatory damages, you may award Ms. McPadden
3 liquidated damages as described above, if you conclude
4 that she has demonstrated that Walmart either knew its
5 conduct was prohibited by the FMLA or that it showed a
6 reckless disregard for whether its conduct was
7 prohibited by the FMLA.

8 Punitive damages are available in limited
9 circumstances as a punishment to defendants and as a
10 warning to others to discourage them from following the
11 defendant's example. If you find in favor of
12 Ms. McPadden on her federal gender discrimination claim
13 under Title VII, then you must also consider whether an
14 award of punitive damages is justified.

15 You may award punitive damages only if you
16 determine by a preponderance of the evidence that
17 Walmart discriminated against Ms. McPadden in violation
18 of federal law and that those discriminatory actions
19 were done maliciously or with reckless indifference to
20 Ms. McPadden's federally protected rights. In other
21 words, you may award punitive damages only if you
22 determine by a preponderance of the evidence that
23 Walmart discriminated against Ms. McPadden despite
24 knowing its conduct was illegal or that it acted with
25 reckless disregard for the laws prohibiting such

1 discrimination.

2 Additionally, Ms. McPadden bears the burden of
3 proving that the Walmart employee who acted with malice
4 or with reckless indifference to her federally protected
5 rights was at the time a managerial or supervisory
6 employee who was acting within the scope of his or her
7 employment.

8 For its part, Walmart may avoid the imposition
9 of an award of punitive damages under Title VII if it
10 demonstrates by a preponderance of the evidence that it
11 engaged in good faith efforts to implement policies that
12 prohibited gender discrimination.

13 If you determine that the facts justify an
14 award of punitive damages, you should try to determine a
15 fair, just, and reasonable amount for Ms. McPadden under
16 all the circumstances. Punitive damages are not
17 intended to compensate a plaintiff for her injuries, but
18 are, instead, intended to punish the defendant and to
19 prevent similar conduct in the future. Thus, if you
20 award punitive damages, you may consider Walmart's
21 financial status and the impact of its having to pay
22 such an award.

23 Punitive damages must bear a reasonable
24 relationship to Ms. McPadden's actual injury. However,
25 no single numerical equation has been made to easily

1 link punitive damages to other damages. In determining
2 a reasonable relationship to the actual injury, you may
3 consider, among other relevant factors, the following:
4 The impact or the severity of Walmart's conduct; whether
5 the punitive damages have a reasonable relationship
6 to the other damages awarded to Ms. McPadden; and
7 whether -- and the deterrent effect, given Walmart's
8 financial condition, that a punitive damages award will
9 have on Walmart's future conduct and on the conduct of
10 others.

11 If you find in favor of Ms. McPadden on her
12 claim that Walmart discriminated against her in
13 violation of New Hampshire's Law Against Discrimination,
14 then you may also consider whether an award of enhanced
15 compensatory damages is justified.

16 Enhanced compensatory damages, unlike punitive
17 damages, may not be awarded in any -- may not be awarded
18 in an effort to punish the defendant. Instead, you may
19 award enhanced compensatory damages only if you find
20 that Walmart's conduct was especially egregious.

21 If you found in plaintiff's favor on her state
22 law discrimination claim under New Hampshire's Law
23 Against Discrimination, then you may award her enhanced
24 compensatory damages if you find that Walmart's conduct
25 was, more probably than not, willful or reckless. A

1 defendant acts willfully if -- if the law imposes a duty
2 on it, it knows of that duty, and it voluntarily and
3 intentionally violates that duty. Reckless means
4 intentional conduct that a person knew or reasonably
5 should have known was unlawful; that is, acting with a
6 conscious disregard of or willful blindness to what the
7 law requires.

8 The amount -- the amount of damages mentioned
9 by counsel is not evidence in this case. A specific
10 request for a total dollar amount made by Ms. McPadden's
11 counsel is simply a request for recovery. In the event
12 you find in favor of Ms. McPadden on one or more of her
13 claims, the amount of the verdict must be based solely
14 on the evidence presented during the course of trial and
15 the law as I've given it to you.

16 When you retire to the jury room to
17 deliberate, you may take with you this charge and the
18 exhibits that the Court has admitted into evidence. The
19 principles of law set forth in these instructions are
20 intended to guide you in reaching a fair and just result
21 in this case, which is important to all the parties.
22 You are to exercise your judgment and common sense
23 without prejudice and without sympathy, but with honesty
24 and understanding. You should be conscientious in your
25 deliberations and seek to reach a just result in this

1 case because that is your highest duty as judges of the
2 facts and as officers of this court.

3 When you retire, you should elect -- you
4 should elect one member of the jury as your foreperson.
5 That individual will act very much like the chairman
6 person of a committee, seeing to it that the
7 deliberations are conducted in an ordinarily fashion and
8 that each juror has a full and fair opportunity to
9 express his or her views, positions, and arguments on
10 the evidence and on the law.

11 The verdict must represent the considered
12 judgment of each juror. In order to return a verdict,
13 each juror must agree to it. That is to say your
14 verdict on each of Ms. McPadden's claims, regardless of
15 whether it is in favor of Ms. McPadden or Walmart, must
16 be unanimous.

17 It is your duty as jurors to consult with one
18 another and to deliberate with a view to reaching an
19 agreement if you can do so without violence to
20 individual judgment. Each of you must decide the case
21 for yourself, but do so only after an impartial
22 consideration of the evidence in the case with the other
23 jurors. In the course of your deliberations, do not
24 hesitate to reexamine your own views or to change your
25 opinion if you become convinced it is erroneous. But do

1 not surrender your honest conviction as to the weight or
2 effect of the evidence solely based on the opinion of
3 the other jurors or merely for the purpose of returning
4 a verdict. Remember at all times that you are not
5 partisans. You are judges. Judges of the facts. Your
6 only interest is to seek the truth from the evidence in
7 the case.

8 If during your deliberations it becomes
9 necessary to communicate with me, please give a written
10 message to the court security officer, who will bring it
11 to me. I will then respond as promptly as possible,
12 either in writing or by meeting with you here in the
13 courtroom. I will always first show the attorneys your
14 question and my response before I answer your question.

15 Now, this is very important. You must not --
16 you must never disclose to anyone, including the Court,
17 me, how the jury stands numerically or otherwise on the
18 matters you are deciding until after you have reached a
19 unanimous verdict or have been discharged. In other
20 words, if the jury is split, say, five to three on some
21 issue, the existence of that split or the number on one
22 side or the other must not be disclosed to anyone,
23 including me.

24 If we recess during your deliberations, please
25 follow all of the instructions that I've given you

1 concerning your conduct during the trial. In
2 particular, do not discuss the case with anyone other
3 than your fellow jurors in the jury room when everyone
4 is present.

5 So if someone goes out for a smoke break, you
6 should stop your deliberations.

7 After you've reached a unanimous verdict, your
8 foreperson must complete, sign, and date the verdict
9 form you will be given. Return this charge together
10 with any written answers to your questions. After you
11 have reached a verdict, you are not required to talk to
12 anyone about the case unless I direct you to do so.

13 At the risk of being repetitive, let me once
14 again tell you that nothing said in these instructions
15 is intended to suggest in any way what your verdict
16 should be. The verdict is the exclusive responsibility
17 of the jury, not the judge. When you have arrived at a
18 verdict, please notify the court security officer and
19 you will be returned to the courtroom.

20 All right. I'll see counsel at sidebar.
21 Actually, you're -- you don't have return these. You're
22 free to take the instructions with you, if you'd like,
23 at the end.

24 (AT SIDEBAR)

25 THE COURT: Objections to the instructions?

1 MS. IRWIN: There was one error -- and first
2 I'd just like to say you and the law clerk and the court
3 did a fabulous job with complicated instructions --

4 THE COURT: However ...

5 MS. IRWIN: -- but on page 29 there was just
6 one error. And we can tell because it's inconsistent
7 with the verdict form for front pay.

8 MR. KACZMAREK: That reference?

9 MS. IRWIN: Yeah.

10 MR. KACZMAREK: Yeah.

11 MS. IRWIN: It should say wrongful termination
12 instead of FMLA.

13 THE COURT: Oh, I see. Okay. All right.

14 Any objections?

15 MS. IRWIN: And then the only other objection
16 is as we stated before the instructions, we believe that
17 there should be an instruction as part of the pretext
18 and temporal proximity instruction that in retaliation
19 cases, while there is -- based on the *Harrington vs.*
20 *Aggregate Industries Northeast Region Inc.* case, 668
21 F.3d 25 at page 33, First Circuit 2012, that in
22 retaliation cases, while something -- something greater
23 than the sum of parts, the bits and pieces of evidence
24 taken collectively, have significantly probative value.

25 And, your Honor, I don't know if we're too

1 late for this, but we did state before that we think
2 there should be an enhanced compensatory damages for the
3 wrongful termination claim.

4 THE COURT: Okay. Yes, I've exercised my
5 discretion not to instruct on enhanced compensatory
6 damages under the state common law cause of action
7 because I don't find this to be an exceptional case
8 warranting such an instruction.

9 Okay.

10 MR. KACZMAREK: Yes, your Honor. We have a
11 number of objections to the --

12 THE COURT: Your objection is overruled, by
13 the way.

14 MS. IRWIN: Thank you, your Honor. And am
15 I -- may I just be permitted to say the basis a little
16 bit more specifically on that one?

17 THE COURT: On --

18 MS. IRWIN: On the wrongful -- the enhanced
19 compensatory --

20 THE COURT: Sure, but -- I guess for your
21 protection. I'm aware of your argument earlier.

22 MS. IRWIN: Okay.

23 THE COURT: I'm not sure -- was that on the
24 record?

25 MS. IRWIN: That's what I'm not sure about.

1 THE COURT: Okay. Sure. Go ahead.

2 MS. IRWIN: I would just say because wrongful
3 termination is an intentional tort, it does require bad
4 faith, malice, or retaliation as part of the element of
5 the claim. We would say that it meets the standard for
6 enhanced compensatory damages.

7 THE COURT: Okay.

8 MS. IRWIN: Thank you, Your Honor.

9 MR. KACZMAREK: Thank you, Your Honor.

10 As previously indicated, defendant objects to
11 the cat's paw instruction. It should state that if a
12 neutral decision-maker, when deciding to terminate an
13 employee, must rely on information that's inaccurate,
14 misleading, or incomplete because of another employee's
15 discriminatory animus as indicated at the *Ameen* case,
16 First Circuit 2015, and that the plaintiff must provide
17 specific evidence of unlawful animus by the employee
18 reporting information to the neutral decision-maker.

19 We don't believe that's accurately reflected
20 in the current jury instructions.

21 THE COURT: Okay. Objection's overruled.

22 MR. KACZMAREK: Okay. With regard to the
23 comparator instruction, the defendant objects to that
24 instruction because, among other reasons, it doesn't
25 indicate that the comparator must be disciplined by the

1 same decision-maker. And we believe that's well
2 established by First Circuit law, including *Champagne*
3 *vs. Servistar*. We also believe that the comparator
4 instruction is inadequate, given that it refers to a
5 companywide policy.

6 THE COURT: Okay. Objection overruled.

7 MR. KACZMAREK: With regard to the FMLA
8 instruction, your Honor, we believe, as we indicated on
9 the record earlier, that the causation standard is
10 inaccurate and it should be the but for causation
11 standard.

12 THE COURT: Okay. Objection overruled.

13 MR. KACZMAREK: With regard to New Hampshire
14 Law Against Discrimination, 354-a, we object and we
15 would reiterate our argument that the Court decides
16 enhanced compensatory damages, not the jury.

17 THE COURT: Okay. Objection overruled.

18 MR. KACZMAREK: With regard to the punitive
19 damages instruction, we believe -- we object to that
20 instruction in its entirety and believe that no such
21 instruction is warranted here, given as we stated on the
22 record earlier that a plaintiff in a Title VII
23 discrimination case is not entitled to a punitive
24 damages instruction when the plaintiff has presented no
25 evidence from which a reasonable jury could conclude

1 that an employer acted with malice or reckless
2 indifference to federally protected rights.

3 THE COURT: Okay. Objection overruled.

4 I don't think I put in the record, so let me
5 do it now. I did put on the record earlier that with
6 respect to your objection to the -- oh, you think the
7 Court should decide it. I'll be happy to decide it, but
8 I'll treat the jury's verdict as advisory verdict --

9 MS. IRWIN: And --

10 THE COURT: -- in that respect. And with
11 respect to a front pay award, any front pay award under
12 Title VII, I believe that's the province of the Court to
13 determine. And I'm submitting it to the jury on an
14 advisory basis and I'll consider their verdict in
15 determining whether front pay should be awarded and to
16 what extent.

17 MS. IRWIN: Your Honor, I would just --

18 MR. KACZMAREK: Two --

19 MS. IRWIN: Sorry.

20 MR. KACZMAREK: That's okay. Go ahead,
21 Lauren.

22 MS. IRWIN: I would just raise an objection to
23 the first issue that you said being advisory. I think
24 it's --

25 THE COURT: Enhanced compensatory damages?

1 MS. IRWIN: -- enhanced compensatory.

2 We believe that the statute was indicating the
3 difference between the Human Rights Commission and the
4 court --

5 THE COURT: Right.

6 MS. IRWIN: -- proceeding. We believe that is
7 a jury question and so --

8 THE COURT: Well --

9 MS. IRWIN: -- you know, obviously --

10 THE COURT: -- it's being submitted to the
11 jury. So no harm, no foul.

12 MS. IRWIN: Thank you, your Honor.

13 MR. KACZMAREK: Just two remaining objections,
14 your Honor.

15 THE COURT: Oh, I'm sorry.

16 MR. KACZMAREK: That's okay.

17 As previously indicated on the record,
18 defendant rejects -- objects to the absence of a
19 mitigation of damages instruction.

20 THE COURT: Okay. Objection overruled for the
21 same reasons I gave earlier.

22 MR. KACZMAREK: Okay. And last but not least,
23 the defendant objects to the pretext instruction with
24 regard to customary and usual business practices.

25 THE COURT: Okay. Objection overruled.

1 MR. KACZMAREK: Okay.

2 MS. IRWIN: Thank you, Your Honor.

3 MR. KACZMAREK: Thank you, your Honor.

4 | Appreciate it.

(BEFORE THE JURY)

9 On page 29, in the front pay instruction on
10 number 3, if you go down four lines and the words are
11 "employment in violation of the FMLA," would you please
12 strike out FMLA and write in "wrongful termination" with
13 a comma after it. And that's a -- that's a
14 typographical error.

15 So -- well, it's more than that, I suppose.
16 It may have wrongly conveyed the notion that FMLA is
17 related to front pay. It's not. But the wrongful
18 termination claim is. So front pay may be awarded under
19 the wrongful termination claim, but not under the FMLA
20 claim.

21 And then, if I could, just task you to make
22 sure that all of the other jurors have conformed their
23 copies of the written instruction to your -- with that
24 change.

25 THE JUROR: I will.

1 THE COURT: Great. Thank you.

2 All right. You may swear the court security
3 officer.

4 (Court security officer sworn.)

5 THE COURT: Just a matter of scheduling before
6 you go.

7 My practice is to allow you to basically set
8 your own schedule. Obviously we'll expect you to kind
9 of put a full-time effort into it. But your schedule,
10 when you report -- if you adjourn tonight, for example,
11 adjourn when you feel appropriate, return tomorrow when
12 you feel appropriate, and set your break schedules and
13 lunch schedules as you like.

22 Anything else?

23 THE CLERK: I just have to go over the
24 exhibits with counsel.

25 THE COURT: All right. Oh, yes. In a few

1 minutes, counsel and the deputy clerk are going to go
2 over the exhibits just to make sure everything that
3 gets -- goes in to you has, in fact, been admitted into
4 the evidence in the case during the course of the trial
5 and they're going to go over the special verdict form
6 that you'll be given that will guide you through the
7 verdict process to make sure that that's perfectly good.

8 And then -- so it'll take a few minutes, but
9 then you'll have all the exhibits and then you'll get
10 the special verdict form to guide you in returning a
11 verdict.

12 (Jury retired to deliberate at 2:38 p.m.)

13 (IN OPEN COURT - NO JURY PRESENT)

14 THE COURT: All right. As I've said, maybe
15 you're aware of it, maybe you're not, there's a local
16 rule that does require you to be in the courthouse while
17 the jury's deliberating. If, however, you want to go
18 back to your office or somewhere close by, if you'd just
19 leave your cell phone number and an absolute no --
20 no-possibility-of-not-reaching-you phone number with
21 Judy, then that's -- that's fine and we'll call you. If
22 you really need to do that, we're happy to call you. I
23 wouldn't take advantage of that for the next hour or
24 two, just in case they have questions, but I leave that
25 up to you. If you're confident, feel free.

Again, well tried case and well argued. And good luck to both of you.

MS. IRWIN: Thank you, your Honor.

(Recess.)

(Jury begins deliberations.)

C E R T I F I C A T E

I, Liza W. Dubois, do hereby certify that the foregoing transcript is a true and accurate transcription of the within proceedings, to the best of my knowledge, skill, ability and belief.

Liza W. Dubois

Liza Dubois, LCR, RMR, CRR

Licensed Court Reporter No. 104

State of New Hampshire

LIZA W. DUBOIS, LCR, CRR

Submitted: 2/12/16